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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the federal gift tax applies to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Acting Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The en banc opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 981 F.2d 991. The panel opinion of the court of appeals (App., *infra*, 29a-49a) is reported at 936 F.2d 343. The memorandum opinion of the district court (App., *infra*, 50a-59a) is unofficially reported at 89-2 U.S.T.C. (CCH) ¶ 13,818.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), are set forth in the Appendix, *infra*, 60a. The relevant portions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), are set forth in the Appendix, *infra*, 60a-63a.

STATEMENT

This case concerns the gift tax liability of Sally Ordway Irvine that stems from her disclaimer, in 1979, of a portion of her remainder interest in the Lucius P. Ordway Trust.

1. In 1917, Mrs. Irvine's grandfather, Lucius P. Ordway, established an irrevocable, inter vivos family trust. The income of the trust was to be paid to Mr. Ordway's wife and their five children during their lives.[1] Upon the death of the last to survive of Mrs. Ordway and the Ordway children, the trust was to terminate. The corpus of the trust was then to be distributed to Mr. Ordway's grandchildren in equal shares. If any of the Ordway grandchildren died with issue prior to termination of the trust, that grandchild's share of the trust principal was to

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[1] The trust also provided that, if any Ordway child died before the trust was terminated, that child's issue and the child's surviving spouse (if not remarried) were to receive the child's share of the trust income (App., *infra*, 2a-3a).

be distributed to his or her surviving issue, per stirpes (App., *infra*, 3a).

Mrs. Irvine became aware of her remainder interest in the trust when she reached the age of majority in 1931 (App., *infra*, 3a). After her father died in 1966, she became entitled to receive a share of the trust income each year (see note 1, *supra*; Tr. Doc. II-38, Exh. B, at 5). Between 1931 and 1979, she took no steps to disclaim either her income or remainder interest in the trust.

On June 27, 1979, the last of Lucius Ordway's children died and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at that time. A thirteenth grandchild had died with issue. The trust's corpus was therefore divided into thirteen shares. On August 21, 1979, Mrs. Irvine filed a disclaimer of a portion (five-sixteenths) of her interest in the trust corpus. That partial disclaimer was valid under Minnesota law. See Minn. Stat. Ann. § 501.211 (West 1988). As a result of her disclaimer, each of Mrs. Irvine's five children received one-sixteenth of her share of the distributed trust principal (App., *infra*, 3a, 52a).

Mrs. Irvine filed a federal gift tax return for the third quarter of 1979. That return disclosed that she had disclaimed a portion of her interest in the Ordway Trust, but took the position that the disclaimer did not effect a transfer of property to which the gift tax applied. Upon audit, the Commissioner of Internal Revenue determined (i) that the disclaimer constituted an indirect "transfer of property by gift" within the meaning of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), and (ii) that the disclaimer was not excepted from tax under Section 25.2511-1(c)

of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), because the disclaimer had not been made "within a reasonable time" (*ibid.*) after Mrs. Irvine became aware of her interest in the trust. Mrs. Irvine then filed an amended gift tax return and reported the disclaimer as a taxable gift. Along with her amended return, she paid the federal gift tax shown due of $7,486,671. She thereafter paid an additional $2,086,627 in accrued interest on the deficiency (App., *infra*, 4a, 31a).

Meanwhile, in August 1980, Mrs. Irvine made another gift that was unrelated to her 1979 disclaimer. She filed a gift tax return for the third quarter of 1980, on which she claimed that the tax due on that gift was offset by the unified credit available to her under 26 U.S.C. 2505. The Commissioner notified Mrs. Irvine, however, that the adjustments required for her amended 1979 third-quarter gift tax return—which reported her partial disclaimer as a gift—reduced the amount of unified credit available to her. As a result, she owed an additional $44,035 in gift taxes for the gift made in 1980. Mrs. Irvine paid the additional tax owed for 1980, plus $10,959 in accrued interest (App., *infra*, 31a-32a).

Mrs. Irvine thereafter filed a timely claim for refund of the gift tax and interest paid for the third quarter of 1979 and the third quarter of 1980. The claim for refund was denied by the Internal Revenue Service (App., *infra*, 4a, 32a).

2. After Mrs. Irvine's death in 1987, respondents—who are the personal representatives of her estate—filed this action seeking a refund of the gift tax and interest paid. On cross-motions for summary judgment, the district court held that the tax was

improperly assessed and ordered a refund of tax and interest in the amount of $22,748,250 (App., *infra*, 4a, 32a-33a).

The district court acknowledged that, in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), this Court held that "a disclaimer [is] a 'transfer' within the scope of the gift tax provisions" (*id.* at 318). The district court concluded, however, that "[t]he fundamental distinction between *Jewett* and the present case is that the original transfer by Lucius Ordway occurred in 1917, well before the Gift Tax Act was passed in 1932" (App., *infra*, 56a). The district court noted that, "[a]s originally enacted, the 1932 Gift Tax Act clearly states that '[t]he tax shall not apply to a transfer made on or before the date of enactment of this Act'" (App., *infra*, 56a-57a (quoting Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245)). The court therefore concluded that the gift tax could not apply to the disclaimer in this case (App., *infra*, 57a).

In reaching its conclusion, the court noted that another district court had "reached the same conclusion on virtually identical facts" in a case involving the same trust and one of Mrs. Irvine's brothers who also had partially disclaimed his interest in the Ordway Trust (App., *infra*, 58a, citing *Ordway* v. *United States*, 89-1 U.S.T.C. (CCH) ¶ 13,802 (S.D. Fla. Mar. 13, 1989)). The court stated that it found the reasoning of the "indistinguishable" *Ordway* decision to be "compelling" (App., *infra*, 58a).

3. A divided panel of the court of appeals reversed (App., *infra*, 29a-49a). Judge McMillian, writing for the court, noted that the Eleventh Circuit, in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991), had reversed the decision on which the district court had relied. Judge

McMillian stated that "[w]e agree with the Eleventh Circuit that the fact that the creation of the Ordway trust in 1917 pre-dated the enactment of the federal gift tax in 1932 is not dispositive" (App., *infra*, 35a). He concluded that the gift tax properly applies to this case because here, "as in *Ordway*, the government does not seek to tax the transfers that created the Ordway trust in 1917; it seeks to tax Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in the trust, an indirect transfer which occurred well after * * * enactment of the gift tax in 1932" (*id.* at 36a).

Judge McMillian noted that "[t]he scope of [the gift] tax is broad, applying 'whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible" (*id.* at 34a, quoting *McDonald* v. *Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988)). He concluded that here, as in *Jewett*, the disclaimer constitutes "an indirect gift to a successor in interest subject to federal gift tax liability" (App., *infra*, 35a, quoting 455 U.S. at 306).

Judge McMillian further concluded that Mrs. Irvine had failed to come within the regulatory safe harbor for disclaimers that occur "within a reasonable time" after the taxpayer acquires knowledge of the interest being disclaimed (App., *infra*, 39a-40a). This safe-harbor provision, Section 25.2511-1(c)(2) of the gift tax regulations, states (26 C.F.R. 25.2511-1(c)(2) (emphasis supplied)):

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, * * * a refusal to accept ownership does *not* constitute the making of a gift

> if the refusal is made within a reasonable time after knowledge of the existence of the transfer.

Judge McMillian noted that the regulatory safe harbor was *potentially* applicable to this case, even though the original trust was established before enactment of the gift tax. Although the regulation applies only to disclaimers from "taxable transfers," that term is defined in the regulations to include any "completed gift for Federal gift tax purposes regardless of whether a gift tax [was] imposed on the completed gift" (App., *infra*, 37a, quoting 26 C.F.R. 25.2518-2(c)(3)). The pre-1932 trust involved in this case therefore qualifies as a "taxable transfer" within the scope of the regulation, and the regulation thus potentially provides a mechanism for a timely disclaimer to escape tax (App., *infra*, 37a).

In *Jewett*, however, this Court held that the "reasonable time" for a disclaimer to be made runs from the time "when the disclaimed interest was created and not later when that interest vested" (App., *infra*, 39a, citing 455 U.S. at 312, 318-319). Since Mrs. Irvine's disclaimer occurred in 1979, which was "some 48 years" after she first became aware of her interest, the disclaimer "was clearly too late" (App., *infra*, 39a).[2]

Senior Judge Bright filed a concurring opinion in which he agreed that "Mrs. Irvine's remainder inter-

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[2] The panel noted that respondents had not contended that *Jewett*, which was decided in 1982, should not be applied "retroactively" to this case (App., *infra*, 41a). The panel therefore declined to consider that issue (*ibid.*). Judge McMillian noted, however, that the Court had found no retroactivity problem in *Jewett* because the taxpayer "never had such a right" to disclaim his interest free of the gift tax (App., *infra*, 41a n.2, quoting 455 U.S. at 317).

est was subject to the federal gift tax unless her disclaimer * * * was timely" (App., *infra*, 43a). Judge Bright stated that "the time period for Mrs. Irvine to disclaim her interest began to run, at the latest, in 1931 when she was aware of her remainder interest and had reached the age of majority" (*ibid.*). He concluded that "Mrs. Irvine's partial disclaimer, almost fifty years later, was not made within a reasonable time" (*id.* at 43a-44a).

Judge Bowman dissented. He stated that Section 25.2511-1(c)(2) of the regulations "reflects the unassailable premise that a disclaimer is not subject to the federal gift tax unless the transfer creating the interest disclaimed was a 'taxable transfer' for purposes of the Gift Tax Act" (App., *infra*, 44a). "Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917" (*id.* at 48a), Judge Bowman reasoned that "it never was subject to the federal gift tax and therefore was never a 'taxable transfer' for federal gift tax purposes" (*ibid.*).

4. On respondents' petition for rehearing with suggestion for rehearing en banc, the court of appeals vacated the panel decision and affirmed the district court by a 7-4 vote (App., *infra*, 1a-28a). The majority stated that "*Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here" (App., *infra*, 6a n.2). The majority noted that Section 25.2511-1(c)(2) of the regulations refers to "*taxable transfers* creating an interest in the person disclaiming made before January 1, 1977" (App., *infra*, 5a, quoting 26 C.F.R. 25.2511-1(c)(2)). In the ma-

jority's view, that regulation "reflects the fundamental principle that a disclaimer should not be subject to the federal gift tax unless the transfer creating the interest disclaimed was itself a 'taxable transfer' " (App., *infra*, 5a-6a). The majority reasoned that, "absent this limitation, the gift tax would be imposed on a donee's refusal to accept a gift that never was subject to the tax in the first place, an anomaly that Congress, given its clear intent * * * that the gift tax should not have any retroactive application, did not ordain" (*id.* at 6a). The majority held that the creation of the trust in 1917, 15 years before the enactment of the gift tax, did not constitute a "taxable transfer" within the meaning of the regulation and that, as a result, the regulation's timeliness requirement did not apply (*id.* at 6a-7a).

The majority then concluded that, because Section 25.2511-1(c)(2) of the regulations is inapplicable, "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (App., *infra*, 10a). Noting that Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), the majority concluded that "this disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*). The majority acknowledged (*id.* at 7a-8a) that its decision is in direct conflict with the Eleventh Circuit's decision in *Ordway* v. *United States*, *supra*, which upheld application of the gift tax to a disclaimer made by another beneficiary of the same Trust.

Judge Loken filed a concurring opinion. He wrote separately "to address whether the regulation in effect when Mrs. Irvine made her disclaimer applies to this case" (App., *infra*, 12a). Judge Loken noted that "[t]he regulation as originally promulgated in 1958

did not contain the current regulation's reference to 'taxable transfers' " (*ibid.*). In his view, "this prior version of the regulation does not apply in this case because it only applied to 'property transferred from a decedent,' whereas the interest Mrs. Irvine disclaimed was created by an inter vivos trust" (*id.* at 13a).

Judge McMillian filed a dissenting opinion in which Senior Judges Lay and Bright and Judge Gibson joined. In their view, "the majority opinion's interpretation of 'taxable transfer' as a transfer made after the enactment of the federal gift tax is too narrow" (App., *infra*, 17a). They would have followed the Eleventh Circuit's decision in *Ordway*, and held (i) that the "reasonable time" within which a taxpayer may avoid the gift tax by disclaiming an interest in property is governed by Section 25.2511-1(c) of the regulations, and (ii) that the term "taxable transfer" as used in that regulation includes " 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transfer was not subject to the gift tax" (App., *infra*, 17a-18a, quoting *Ordway* v. *United States*, 908 F.2d at 895). The dissent concluded that "whether or not the interest created was established before the enactment of the federal gift tax is irrelevant; the key is whether the interest was created by a 'taxable transfer,' that is, a completed gift" (*id.* at 20a).

REASONS FOR GRANTING THE PETITION

The decision in this case creates a direct conflict in the circuits on a recurring matter of substantial administrative importance. The court of appeals held that a taxpayer's disclaimer of a remainder interest

in a trust—a disclaimer made 62 years after the creation of the trust and 48 years after the taxpayer attained her majority—was not a transfer subject to the federal gift tax because the trust had been created prior to the enactment of the federal gift tax. As the court of appeals recognized (App., *infra*, 7a-8a), its decision directly conflicts with the decision of the Eleventh Circuit in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991). It also contradicts the express holding of this Court in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), that the disclaimer of a remainder interest in a trust is a "transfer of property by gift" (26 U.S.C. 2501(a)(1)) to which the gift tax applies.

The question presented in this case affects a significant number of individuals who have remainder interests in trusts that were established before the gift tax was enacted in 1932. As the facts of this case and the *Ordway* case indicate, the tax treatment of such disclaimers potentially affects billions of dollars of assets and enormous amounts of gift tax revenues. Unless the clear conflict among the circuits is resolved by this Court, the tax treatment of such disclaimers—even for beneficiaries of the same trust, and even though millions of dollars of taxes are affected—will continue to vary solely due to geographical happenstance.

1. Sections 2501(a) and 2511(a) of the Internal Revenue Code impose a tax "on the transfer of property by gift," whether the transfer "is in trust or otherwise," and whether the gift is "direct or indirect." 26 U.S.C. 2501(a), 2511(a). By taxing gifts, Congress sought to discourage circumvention of the estate tax by means of inter vivos transfers

that deplete taxable estates. See, *e.g.*, *Jewett* v. *Commissioner*, 455 U.S. at 310; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939). Consistent with that objective, "Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property" (*Dickman* v. *Commissioner*, 465 U.S. 330, 334 (1984)). See H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932); S. Rep. No. 665, 72d Cong., 1st Sess. 39 (1932)). In *Jewett* v. *Commissioner*, the Court therefore held that the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust" (455 U.S. at 310). The Court noted that the practical effect of a disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (*ibid.*).

The Treasury Regulations on Gift Tax implement the broad scope of the federal tax by providing that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1 (c)(1)). For disclaimers of property, however, there is a narrow exception, or safe harbor, to this general rule of taxability. Section 25.2511-1(c)(2) of the regulations provides that a refusal to accept ownership of property does not constitute a gift if two conditions are met. First, the refusal must be effective under local law. Second, the refusal must be made "within a reasonable time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1 (c)(2)).[3] This Court held in *Jewett* that the term

[3] The "reasonable time" requirement of the regulation applies to disclaimers of interests that were created before Jan-

"transfer," as used in the regulation, refers to the original creation of the interest, rather than the subsequent vesting of that interest. 455 U.S. at 311-312. In *Jewett*, the trust was established in 1939 under the will of the taxpayer's grandmother, but the taxpayer did not disclaim his contingent remainder interest until 1972. The Court held that the disclaimer—filed 33 years after the interest was created—was untimely. *Id.* at 318-319.

In this case, Mrs. Irvine's contingent remainder interest was created upon establishment of the trust in 1917. She learned of her interest in the trust by the time she attained her majority in 1931. After her father's death in 1966, Mrs. Irvine became entitled to receive a share of the income from the Ordway trust each year, and her share increased after the death of her mother in 1974. See note 1, *supra*; Tr. Doc. II-38, Exh. B at 5. Mrs. Irvine did not, however, disclaim any portion of her remainder interest in the trust corpus until after the termination of the trust in 1979. At that time, she was 68 years old, had enjoyed her income interest in the trust for 13 years and had known of her remainder interest in the trust for 48 years. As this Court stated in *Jewett*, a disclaimer in these circumstances is subject to the gift tax because—"like the holder of a general power [of appointment]—a disclaimant may decide to retain the interest himself. It is this characteristic of the control exercised by the disclaimant that makes a disclaimer a 'transfer' within the scope of the gift tax provisions" (455 U.S. at 318).

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uary 1, 1977 (26 C.F.R. 25.2511-1(c)(2)), and therefore applies in this case. Congress has enacted specific and objective time criteria for the non-taxability of disclaimers of interests created *after* 1976. See note 5, *infra*.

2. Relying on this Court's decision in *Jewett*, the government contended in this case that (i) Mrs. Irvine's disclaimer was subject to the federal gift tax and (ii) that the disclaimer was not made "within a reasonable time" of her knowledge of her interest in the Trust and thus was not exempted from the tax under the safe-harbor provisions of Section 25.2511-1(c) of the gift tax regulations. The court of appeals held, however, that the disclaimer was not subject to the gift tax because the transfer creating the Trust was made before enactment of the first gift tax in 1932 and Congress had made clear its intent that the gift tax not be applied "retroactively" (App., *infra*, 7a-10a).

a. The court of appeals misperceived the transaction that is subject to tax in this case. It is Mrs. Irvine's 1979 disclaimer, not her grandfather's 1917 transfer in trust, to which the gift tax applies. No gift tax has been imposed upon Lucius Ordway's original transfer in trust. That 1917 transfer is relevant only in establishing the date on which the interest disclaimed was created. See note 3, *supra*. Mrs. Irvine's partial disclaimer of her remainder interest in 1979 is a separate and distinct transaction.

Mrs. Irvine's remainder interest in the Trust was a valuable property interest, even though it was subject to contingencies and did not become possessory until immediately before she partially disclaimed it in 1979. See *Jewett* v. *Commissioner*, 455 U.S. at 318-319; *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). After the death of her father in 1966, Mrs. Irvine became entitled to receive a share of the income of the trust each year. And, for 48 years, Mrs. Irvine possessed the power to decide the ultimate disposition

of her remainder share of the corpus of the trust, and she relinquished that power only after her interest became possessory. It is precisely upon the relinquishment of the power to control the disposition of property that the gift tax is laid. *E.g.*, *Estate of Sanford* v. *Commissioner*, 308 U.S. at 43; *Burnet* v. *Guggenheim*, 288 U.S. 280, 285-287 (1933). As this Court stated in *Jewett*, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer of a contingent future interest in a trust," for the effect of the disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (455 U.S. at 310).

Under *Jewett*, Mrs. Irvine's long-delayed disclaimer is "unquestionably" (405 U.S. at 310) a transfer to which the gift tax applies. The decision in this case thus conflicts not only with the Eleventh Circuit's decision in *Ordway* v. *United States*, 908 F.2d at 893-895, but also with this Court's decision in *Jewett*.[4]

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[4] The majority's reliance (App., *infra*, 9a-10a) on *Commissioner* v. *Copley's Estate*, 194 F.2d 364 (7th Cir. 1952), is misplaced. In *Copley's Estate*, a couple entered into an antenuptial agreement in 1931 under which the prospective husband agreed to pay $1 million to his future wife upon demand at any time after their marriage. In return, she surrendered any other marital property rights to which she may have been entitled. In fulfillment of this pledge, the husband transferred $500,000 in securities to his wife in 1936 and the same amount in 1944. Although such a transfer of property in return for the surrender of marital property rights had been held to be a gratuitous transfer (see *Commissioner* v. *Wemyss*, 324 U.S. 303, 306-307 (1945)), the Seventh Circuit held that the transfers involved in *Copley's Estate* were not subject to the gift tax because the relevant transaction preceded enactment of the tax. In the Seventh Circuit's view, in

b. The court of appeals further erred in concluding that Section 25.2511-1(c)(2) of the gift tax regulations does not apply in the circumstances of this case. Under this regulation, a disclaimer is *not* subject to the gift tax if it was made within a reasonable time after the "taxable transfer" that created the interest (26 C.F.R. 25.2511-1(c)(2)).[5] The majority

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1936 and 1944, the husband was simply discharging an obligation that arose under the 1931 agreement. The court concluded that, in these circumstances, subjecting the transfers to the gift tax would have amounted to a retroactive imposition of the tax. 194 F.2d at 367. By contrast, in the present case, it is the disclaimer made by Mrs. Irvine in 1979—not the distribution of the trust assets upon termination of the trust—that is being subjected to tax.

The facts of *Copley's Estate* would parallel the facts of the present case only if *Copley's Estate* involved a gratuitous transfer *by the wife after 1932* of her right to receive the property from her husband. In that hypothetical situation, as here, the gratuitous transfer of an interest in property after 1932 would plainly be subject to the gift tax.

[5] The disclaimer regulation (26 C.F.R. 25.2511-1(c)) was amended on August 7, 1986, to conform to the new regulations then being issued under Section 2518 of the Internal Revenue Code. See T.D. 8095, 1986-2 C.B. 160. Section 2518 of the Code was enacted in 1976. For disclaimers of interests created *after* 1976, Section 2518 eliminated the "reasonable time" requirement of the disclaimer regulation and established new, objective rules for determining the timeliness of disclaimers. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b), (e)(2), 90 Stat. 1893, 1896. Under the new statute, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest is made or the day on which the person making the disclaimer attains age 21. 26 U.S.C. 2518(b)(2). Section 2518 is not directly involved in this case because it applies only to disclaimers of interests that were created after December 31, 1976 (Treas. Reg. 25.2518-1(a)), and the interest disclaimed

concluded that the creation of the trust in 1917, fifteen years before the gift tax was enacted, did not constitute a "taxable transfer" within the meaning of the regulation, and that, as a result, the regulation's timeliness requirement did not apply in this case (App., *infra*, 6a-7a). As the Eleventh Circuit correctly recognized in *Ordway* v. *United States*, 908 F.2d at 895, however, the term "taxable transfer" in the amended regulation merely refers to a transfer that is a completed gift, whether or not a gift tax was actually imposed. Section 25.2518-2(c)(3) of the regulations specifically provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." For the purposes of measuring the time in which to file a tax-free disclaimer, a "taxable transfer" occurs under the regulations "whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax" (*Ordway* v. *United States*, 908 F.2d at 895, quoting 26 C.F.R. 25.2511-1(c)(1) (citation omitted)).[6]

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by Mrs. Irvine was created in 1917. As noted by the dissent, "§ 25.2511-1(c)(2) and § 25.2518 are complementary regulations: interests created by 'taxable transfers' made after December 31, 1976, are subject to the 'new' uniform standards established by the 1976 Act and § 25.2518, while interests created by 'taxable transfers' before January 1, 1977, are subject to the 'old' standards set forth in § 25.2511-1(c)(2)" (App., *infra*, 20a).

[6] The majority urged that the Eleventh Circuit misapplied this regulation, on the theory that the regulation is concerned

Under this express regulatory definition, the 1917 transfer in trust constitutes a "taxable transfer" for purposes of the disclaimer regulation even though that transfer "was not subject to the gift tax" (*ibid.*). Whether the interest disclaimed by Mrs. Irvine was created before or after enactment of the federal gift tax, her failure to disclaim her interest "within a reasonable time" thus precludes her reliance on the safe-harbor provisions of the regulation.

c. The majority also erred in concluding that, if Section 25.2511-1(c)(2) of the regulations is inapplicable to this case, then "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (App., *infra*, 10a). Based on that erroneous conclusion, the majority held that, because Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), her "disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*).

Even if the court of appeals had been correct in concluding that the safe-harbor regulation does not apply to Mrs. Irvine's disclaimer, that does not mean that the disclaimer is non-taxable. The regulation merely creates a limited exception to the otherwise

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"with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers" (App., *infra*, 9a). As the dissent correctly pointed out, however, "[t]he reference to the $10,000 annual exclusion on gifts in § 25.2518-2(c)(3) is merely *an illustration* of how a taxable transfer may occur when there is a completed gift regardless of whether the gift tax is imposed on the completed gift" (App., *infra*, 22a). The single illustration provided by the regulation obviously does not exhaust the entire scope of its provisions.

comprehensive scope of the gift tax.[7] It provides that, if a disclaimer is made within a reasonable time, then (and only then) it "does *not* constitute the making of a gift" (26 C.F.R. 25.2511-1(c)(2) (emphasis added)). If a disclaimer does *not* come within the terms of this regulatory exception, it is taxable under the general rule of the regulation that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1(c)). See also *Dickman* v. *Commissioner*, 465 U.S. at 334 ("Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property").

The "validity" of the disclaimer under local law (which has not been contested by any party) is relevant only because, if the disclaimer were *not* valid under local law, there would have been no completed transfer and this case would never have arisen. See 26 U.S.C. 2501(a)(1) (imposing a tax on "the transfer of property by gift"). The fact that the disclaimer was valid under Minnesota law merely establishes that there was in fact a "transfer of property" (*ibid.*). It has no bearing on whether or not that transfer was "by gift" and is therefore subject to the gift tax. See *ibid.* The question whether a disclaimer constitutes a transfer of property "by gift" was resolved by this Court in *Jewett*, where the Court held that the transfer "by means of a disclaimer[] of a

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[7] It is well established that exemptions from taxation are to be narrowly construed. *E.g.*, *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969).

contingent future interest in a trust" is "unquestionably" within the scope of the gift tax (455 U.S. at 310).

By erroneously referring to state law, rather than federal law, for determining the ultimate question of whether a transfer "by gift" has occurred, the en banc decision of the court of appeals in this case conflicts both with the decision of the Eleventh Circuit in *Ordway* and with this Court's decision in *Jewett*.

3. The question presented in this case is one of substantial recurring importance. The amount at issue in this single case, including interest, currently exceeds $30,500,000. Other cases involving the disclaimer of remainder interests in the Ordway Trust, in which an additional several million dollars in gift tax and interest are at stake, are currently pending in two district courts. *Johnson* v. *United States*, No. 89-8192 (S.D. Fla. filed Apr. 27, 1989); *Johnson* v. *United States*, No. 3-89-265 (D. Minn. filed Apr. 28, 1989). More importantly, the decision of the court of appeals affects the gift tax liability (and, indirectly, the potential estate tax liability) of a large number of individuals who have contingent remainder interests in trusts created prior to the enactment of the gift tax.[8] Relying on the opinion of the court

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[8] The decision of the court of appeals also threatens significant uncertainty for application of the disclaimer rules to interests in property created by various other types of inter vivos and testamentary transfers that constitute completed dispositions of property and are therefore "taxable transfers" within the meaning of the regulations even though they do not give rise to estate or gift tax liability. Among these are the release or lapse of a general power of appointment (26 U.S.C. 2041(a)(1)), transfers by nonresident aliens of property situated outside the United States (26 U.S.C. 2103), and

of appeals, these individuals may now seek to disclaim such interests on a tax-free basis, even though they may have known of the existence of their interests, and controlled the disposition of those interests, for many years.

The Internal Revenue Service advises that thousands of trusts created prior to 1932, with billions of dollars of trust assets, remain in existence. It is, of course, impossible to estimate with precision the magnitude of the impact of the decision of the court of appeals. It is nonetheless evident that the decision in this case offers significant new opportunities for gift and estate tax avoidance by members of the wealthiest class of taxpayers. Left intact, the decision in this case will predictably generate a large volume of claims and litigation involving substantial amounts of revenue.

In the absence of a decision from this Court, the tax treatment of disclaimers of these valuable property interests will vary solely because of the circuit in which the taxpayer happens to reside. Taxpayers who control the disposition of billions of dollars of trust assets in circuits that have not yet spoken on the question presented in this case will be unable to pursue their important gift and estate planning decisions with certainty. Further review of this recurring issue by this Court is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

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the creation of joint interests between spouses (26 U.S.C. 2515 (1976)). Extension of the analysis adopted by the court of appeals majority in this case to property interests created by such transfers would result in a substantial erosion of the gift tax base.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 89-5616

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the ESTATE OF SALLY O. IRVINE, APPELLEES

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court for the District of Minnesota

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Submitted: January 6, 1992

Filed: December 28, 1992

Before LAY,* Chief Judge, BRIGHT, Senior Circuit Judge, McMILLIAN, ARNOLD,** JOHN R.

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* The Honorable Donald P. Lay was Chief Judge of the United States Court of Appeals for the Eighth Circuit at the time this case was submitted and took senior status on January 7, 1992.

** The Honorable Richard S. Arnold became Chief Judge of the United States Court of Appeals for the Eighth Circuit on January 7, 1992.

GIBSON, FAGG, BOWMAN, WOLLMAN, BEAM, LOKEN, and HANSEN, Circuit Judges, En Banc.

BOWMAN, Circuit Judge.

The United States appeals from the order of the District Court granting summary judgment in favor of John O. Irvine and First Trust National Association (taxpayers) as the personal representatives of the Estate of Sally Ordway Irvine (Mrs. Irvine) and directing the government to refund federal gift taxes and interest paid by Mrs. Irvine for the third quarter of 1979 and the third quarter of 1980. For reversal, the government argues the District Court erred in holding that Mrs. Irvine's partial disclaimer in 1979 of a remainder interest in a trust created by her grandfather in 1917 was not subject to federal gift tax, I.R.C. §§ 2501-2524 (1988).

A three-judge panel of this Court, with one judge dissenting, ruled in favor of the government. *Irvine v. United States*, 936 F.2d 343 (8th Cir. 1991) (subsequent history omitted). The Court granted taxpayers' suggestion for rehearing en banc, thereby vacating the panel opinion. We now affirm the order of the District Court.

I.

The underlying facts are not disputed. Mrs. Irvine was a granddaughter of Lucius P. Ordway. In January 1917 Lucius P. Ordway established an irrevocable inter vivos trust. The trust income was to be paid to Ordway's wife, Jessie G. Ordway, and their five children for their lives. The trust also provided that if any of Ordway's children died before the termination of the trust, that child's issue and the

child's surviving spouse, as long as the surviving spouse remained unmarried, would receive the child's share of the trust income. On the death of the last surviving life beneficiary, the trust would terminate and the trust corpus would be distributed to the grandchildren, per capita. If any of the grandchildren died with issue before the termination of the trust, that grandchild's share would be distributed in equal portions to his or her surviving issue. Mrs. Irvine became aware of her contingent remainder interest in the trust when she turned 21 in 1931.

In June 1979 Katharine G. Ordway, who was Mrs. Irvine's aunt and the last surviving child of Lucius P. Ordway, died unmarried, and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at the time of Katharine G. Ordway's death. Because one grandchild had died with issue, the trust corpus was to be divided into thirteen shares. In August 1979, about two months after Katharine G. Ordway's death, Mrs. Irvine disclaimed part of her share of the trust corpus. It is undisputed that Mrs. Irvine's partial disclaimer was valid under Minnesota law. Minn. Stat. § 501.211 (1988) (valid disclaimer if filed in Minnesota district court within six months of event which causes disclaimant to be finally ascertained and interest indefeasibly fixed), *repealed by* 1989 Minn. Laws, ch. 340, art. 1, § 77 (replaced by Minn. Stat. § 501B.86 (1990), which changed the deadline to nine months effective January 1, 1990). As a result of the partial disclaimer, Mrs. Irvine was treated, with respect to the disclaimed interest, as if she had died before the termination of the trust, and her five children thus received, as provided by the trust instrument, the disclaimed portion of her share of the trust corps.

On audit of Mrs. Irvine's gift tax return for the third quarter of 1979, the Internal Revenue Service (IRS) took the position that the disclaimer effected a taxable gift by Mrs. Irvine to her children. Mrs. Irvine consequently paid, under protest, the gift tax asserted to be due on the disclaimer, as well as the accrued interest on the deficiency, and filed a timely claim with the IRS for a refund. Later the IRS notified Mrs. Irvine that, because the adjustments made to her gift tax return for the third quarter of 1979 on account of the disclaimer had reduced the amount of unified credit available to her, she owed additional gift taxes for the third quarter of 1980. She paid these additional taxes and accrued interest, and made another timely filing with the IRS for a refund. In March 1987 the IRS disallowed both of the refund claims, and in November of that year Mrs. Irvine died.

In February 1988, taxpayers filed the present action seeking a refund of the gift taxes and interest paid. *See* I.R.C. § 7422 (1988); 28 U.S.C. § 1346 (a)(1) (1988). On cross-motions for summary judgment, the District Court ruled in favor of taxpayers, holding they are entitled to a refund of the gift taxes and interest paid for the third quarter of 1979 and the third quarter of 1980, together with the accrued interest on those amounts. A final judgment was entered for taxpayers in the total amount of $22,748,250.43, plus interest from the date of judgment. This appeal followed.

II.

We review de novo the district court's decision to grant summary judgment. Summary judgment is proper when there is no genuine issue of material

fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *McCuen v. Polk County*, 893 F.2d 172, 173 (8th Cir. 1990). In the present case, the relevant facts are not disputed.

III.

The question on which this appeal turns is whether Mrs. Irvine's 1979 partial disclaimer of her contingent remainder interest in an irrevocable trust created in 1917 (when there was no federal gift tax) effected a gift to her children for federal gift tax purposes. The government contends that it did, basing its position on the application of Treasury Regulation § 25.2511-1(c)(2), which provides in pertinent part:

> In the case of *taxable transfers* creating an interest in the person disclaiming made before January 1, 1977 . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance.

Treas. Reg. § 25.2511-1(c)(2) (as amended in 1986) (emphasis added).[1] This regulation reflects the fun-

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[1] The government in its oral argument has conceded that Section 25.2511-1(c)(2) as amended in 1986 supersedes any earlier version of the regulation and governs this case. The earliest version of this regulation, which has the effect of creating a federal standard governing the validity of disclaimers for gift tax purposes, was promulgated in 1958.

damental principle that a disclaimer should not be subject to the federal gift tax unless the transfer creating the interest disclaimed was itself a "taxable transfer"; absent this limitation, the gift tax would be imposed on a donee's refusal to accept a gift that never was subject to the tax in the first place, an anomaly that Congress, given its clear intent, as discussed *infra*, that the gift tax should not have any retroactive application, did not ordain. We note that, consistent with this fundamental principle, the Treasury Department has not promulgated any regulation dealing with the disclaimer of interests created by "nontaxable transfers."

The transfer that created Mrs. Irvine's contingent remainder interest occurred in 1917, when Lucius P. Ordway established his irrevocable inter vivos trust. If the establishment of this trust is indeed a "taxable transfer," even though in 1917 the federal gift tax had not yet been enacted, then Mrs. Irvine's disclaimer of her contingent remainder interest created by the trust would be subject to the federal gift tax unless her disclaimer was timely within the meaning of the regulation.[2] But if the creation of her interest by the 1917 Ordway trust is not a "taxable transfer," then the interest validly disclaimed by Mrs. Irvine under Minnesota law passes to her five children unencumbered by the federal gift tax. The govern-

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[2] The issue of timeliness in cases controlled by the regulation is the subject of *Jewett v. Commissioner*, 455 U.S. 305 (1982). *Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here. It is beyond dispute that in *Jewett* the transfer creating an interest in the person disclaiming was a taxable transfer.

ment stakes its case on the proposition that the creation of Mrs. Irvine's interest in the Ordway trust is a "taxable transfer" within the meaning of Treasury Regulation § 25.2511-1(c)(2). We find that proposition untenable.

It is fundamental that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made. No such federal tax existed on January 16, 1917, when Lucius P. Ordway irrevocably transferred assets to the trustees of the Ordway trust and Mrs. Irvine's interest was created. Moreover, fifteen years later when the Gift Tax Act of 1932 was enacted, Congress expressed its intention not to apply the tax retroactively. Section 501(b) of the Act states: "The tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169, 245 (1932). This prohibition against retroactive application of the tax to pre-Act gifts has been continued throughout revisions of the Gift Tax Act and is reflected in the current Internal Revenue Code (Code) in the section governing computation of the tax. I.R.C. § 2502 (1988) (the tax is computed upon the aggregate sum of taxable gifts made throughout the donor's life during periods following June 6, 1932). "Congress has been careful to avoid any taint of retroactivity in connection with the 1932 [gift] tax and the subsequent amendments to the tax." Charles L. B. Lowndes et al., *Federal Estate and Gift Taxes* 643 (3d ed. 1974).

We are mindful that in a case involving Mrs. Irvine's brother John G. Ordway, the Eleventh Circuit has held that "the 1917 gift [of Lucius P. Ordway] was a taxable transfer." *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990), *cert. denied*,

—— U.S. ——, 111 S. Ct. 2916 (1991). The *Ordway* decision gives a new definition to the term "taxable transfer" by referring to section 25.2518-2(c)(3) of the regulations, which provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." Treas. Reg. § 25.2518-2(c)(3). Based on that language, the *Ordway* decision concludes that "a taxable transfer occurs whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' 26 C.F.R. § 25.2511(c)(1) [sic], even if that transaction was not subject to the gift tax." *Ordway*, 908 F.2d at 895.

Relying on *Ordway* and its interpertation of Treasury Regulation § 25.2518-2(c)(3), the government urges us to join the Eleventh Circuit in holding that the term "taxable transfer" in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax. We are unable, however, to accept our sister circuit's startling conclusion. The *Ordway* court's reliance on a single sentence from a regulation explicating a section of the Code that is plainly inapplicable to this situation[3] is inappropriate and misplaced. We have dif-

[3] Neither Mrs. Irvine's nor her brother John G. Ordway's disclaimer is governed by section 2518 of the Internal Revenue Code. *See* I.R.C. § 2518 (1988). The interest each of them disclaimed was created by a transfer in the year 1917. Section 2518 and the rules implementing section 2518 apply only to the disclaimer of interests created by taxable transfers made after December 31, 1976. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1520, 1896 (1976); Treas. Reg. § 25.2518-1(a)(1).

ficulty in understanding how there can be, in the language of section 25.2518-2(c)(3), "a completed gift for Federal gift tax purposes" unless a federal gift tax is in force when the gift is made.

Moreover, the sentence relied upon is taken out of context to support an expanded and illogical definition of the term "taxable transfer" that would include a pre-Act transfer. The distorted nature of this reading of the regulation is evident when the sentence is read in context with the sentence that immediately follows it: "[A] taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers . . . ." Treas. Reg. 25.2518-2(c)(3). Clearly, the sentence upon which the Eleventh Circuit relied is concerned with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers. There is a definitive difference between a taxable transfer that qualifies for the annual exclusion and on which a gift tax therefore is not imposed, such as an annual $10,000 check to a favorite nephew, and a transfer as to which the gift tax is not even applicable, such as a transfer pursuant to an obligation created in an antenuptial agreement executed in 1931 between a man and woman married later that year. *See Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) (transfers made in 1936 and 1944 pursuant to 1931 agreement were not taxable because "[t]o hold, as the Commissioner would have us do . . . would require a retroactive application of [the gift tax], which we think is not permissible. See

Sec. 501(b) of the Revenue Act of 1932."). The creation of the Ordway trust in 1917 falls into the same category as the transfers pursuant to the 1931 antenuptial agreement in *Copley's Estate*; it is a transfer as to which the federal gift tax is inapplicable—and even more cleanly and clearly so than the post-1932 transfers pursuant to the 1931 agreement in *Copley's Estate*.

In light of the consistently expressed intent of Congress not to apply the gift tax retroactively to transfers made prior to June 6, 1932, we cannot accept the proposition that the term "taxable transfer" in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax. Logic, history,[4] the expressed intent of Congress, and a straightforward reading of the regulations all join here to compel the opposite conclusion. Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917, it never was subject to the federal gift tax and therefore was never a "taxable transfer" for federal gift tax purposes. Once the pretense that by some mysterious alchemy the treasury regulations have transformed the 1917 transfer into a taxable event is stripped away, the government is left without any basis to sustain its position.

As taxpayers point out, if Treasury Regulation § 25.2511-1(c)(2) is inapplicable—and we hold that it is—then state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes. *See*

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[4] The Supreme Court struck down, on Due Process grounds, the original federal gift tax (enacted in 1924) to the extent it attempted to tax transfers completed prior to its effective date. *Blodgett v. Holden*, 275 U.S. 142 (1927).

Hardenbergh v. Commissioner, 198 F.2d 63 (8th Cir.) (where no applicable regulation Court applied state law to determine the validity for federal gift tax purposes of disclaimers of rights to intestate shares), *cert. denied*, 344 U.S. 836 (1952); *see also Jewett v. Commissioner*, 455 U.S. 305, 315 (1982) (under cases antedating the initial regulation on disclaimers in 1958, "state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation"). The government concedes Mrs. Irvine's disclaimer is valid under Minnesota law. The regulation being inapplicable, this disclaimer therefore is not a transfer upon which a gift tax is owed.

Having concluded that Treasury Regulation § 25-2511-1(c)(2) is inapplicable, we have no occasion to consider the issues concerning the impact of that regulation on Mrs. Irvine's disclaimer. Those issues are discussed in the latter portion of the dissenting opinion. Because in our view they are not live issues in this case, we do not reach them.

IV.

We hold that the creation in 1917 of Mrs. Irvine's interest in the Ordway trust was not a taxable transfer. It follows that Treasury Regulation § 25.2511-1(c)(2) is inapplicable. Accordingly, Mrs. Irvine's refusal to accept part of this nontaxable gift from her grandfather—a refusal valid under state law—also is not a taxable transfer. As the federal gift tax does not apply to Mrs. Irvine's disclaimer, the decision of the District Court in favor of taxapayers is affirmed.

LOKEN, Circuit Judge, concurring.

I join the opinion of the court because I agree that the current 1986 version of Treas. Reg. § 25-2511-1 (c) (2) does not apply in this case. Lucius Ordway's creation of the trust in 1917 was not a taxable transfer. However, I am not as confident as the court that the government's contentions are limited to the current version of the regulation. Therefore, I write separately to address whether the regulation in effect when Mrs. Irvine made her disclaimer applies to this case.

The regulation as initially promulgated in 1958 did not contain the current regulation's reference to "taxable transfers." [1] It provided in relevant part:

> Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be . . . effective under the local law. . . . [I]f a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer,

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[1] The pivotal issue in this case is whether Mrs. Irvine's 1979 disclaimer was a taxable transfer. The 1917 transfer is relevant only because the current regulation makes it relevant. To illustrate this point by an obvious example, if my father gives property to my daughter tomorrow, whether that transfer is a taxable gift does not turn on whether he acquired the property by gift from his grandparents in 1917.

> he will be presumed to have accepted the property.

Treas. Reg. § 25.2511-1(c) (1958). With minor changes, this regulation was in effect in 1979 when Mrs. Irvine made her disclaimer. Under this regulation, Mrs. Irvine did not make her 1979 disclaimer "within a reasonable time after learning of the existence of the transfer." *See Jewett v. Commissioner*, 455 U.S. 305, 318-319 (1982). Consequently, I find it surprising that the government has referred to the 1958 regulation in its briefs but has not expressly argued that this regulation does apply, that under it Mrs. Irvine must be "presumed to have accepted the property" prior to her 1979 disclaimer, and therefore that she should be considered the owner of that property interest and her disclaimer a taxable gift.[2]

My answer to this argument is a simple one—this—prior version of the regulation does not apply in this case because it only applied to "property transferred from a decedent," whereas the interest Mrs. Irvine disclaimed was created by an inter vivos trust. At first blush, that may seem like an overly-technical reading of the regulation. I submit it is not.

As Congress recognized when it adopted I.R.C. § 2518 in 1976, two district federal tax issues arise from disclaimers. The first is the issue in this case: whether a disclaimer is a taxable event. The second issue concerns the effect a disclaimer will have on the original transfer of the disclaimed interest, for

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[2] As this court has recognized, the gift tax applies broadly to direct and indirect transfers of property interests including contingent remainders and other future interests. *See* Treas. Reg. §§ 25.2511-1(f), 25.2512-5; *O'Reilly v. Commissioner*, 973 F.2d 1403, 1405 (8th Cir. 1992).

instance, when the disclaimer passes property to a beneficiary that qualifies for the estate tax charitable or marital deduction. *See generally* H. R. Rep. No. 1380, 94th Cong., 2d Sess. 67, *reprinted in* 1976 U.S.C.C.A.N. 3356, 3421. Because this second issue is likely to be more significant in the case of testamentary transfers than inter vivos transfers, I cannot assume that the Commissioner inadvertently limited the 1958 regulation to testamentary transfers. In other words, this is not a case where plain limiting language in the regulation should be ignored.

When the Commissioner adopted Treas. Reg. § 25.2511-1(c) in 1958, Congress had recently enacted I.R.C. §§ 2055 and 2056, which provided that the estate tax charitable and marital deductions would apply to property that passed from the decedent to an eligible beneficiary who received the property by reason of a disclaimer made before the date prescribed for the filing of the estate tax return. I.R.C. of 1954, Pub. L. No. 591, §§ 2055(a), 2056(d), 68A Stat. 390-91, 395 (1954). In an October 1, 1958, Memorandum to the Secretary of the Treasury discussing the new regulation,[3] the Commissioner explained that the rule was intended to codify the adoption of state law in two testamentary cases, *Brown v. Routzahn*, 63 F.2d 914, 916 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), and *Hardenbergh v. Commissioner*, 198 F.2d 63, 66 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952). The regulation also added the limitation that, to avoid the federal gift tax, the disclaimer must be made within a reasonable time, a concept already reflected in sections 2055 and 2056 of the 1954 Code.

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[3] The Memorandum can be found at page 203-204 of the July 27, 1981 issue of Tax Notes.

There is further contemporaneous evidence that the Commissioner intentionally limited the 1958 regulation to the disclaimer of testamentary interests. In 1956, the American Law Institute published its Tentative Draft No. 11 of a proposed Federal Income, Estate and Gift Tax Statute. Section X1007(h) of that proposal provided that an "irrevocable renunciation of an interest in property" is not a taxable gift if made "within a reasonable time after the person . . . first bec[a]me aware of the existence of the interest." That provision expressly applied to disclaimers of interests obtained "through an inter vivos gift," as well as testamentary interests. Tentative Draft No. 11, § X1007(h)(2)(A)-(B) (A.L.I. 1956). When § 25.2511-1(c) was initially proposed, it too applied broadly to any "renunciation of a vested property interest." *See* 22 Fed. Reg. 53, 58 (Jan. 3, 1957). However, the final regulation applied only to a "refus[al] to accept ownership of property transferred from a decedent," with the explanation that "the Gift Tax Regulations have been conformed to agree with the positions taken in the Estate Tax Regulations." *See* the Commissioner's Memorandum cited in note 3. Though this history is less than fully enlightening, it persuades me that the Commissioner intentionally limited the 1958 regulation to the disclaimer of testamentary interests.[4]

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[4] Although the A.L.I. proposal included disclaimers of inter vivos as well as testamentary interests, the Comment to Tentative Draft No. 11, § 1007(h), at 32-33, acknowledged:

> Since an extension of the provision to inter vivos transfers raises greater possibilities of tax avoidance, however, it has been suggested that this section be limited to testamentary transfers. Such a limitation was rejected

Limiting the 1958 regulation to its plain language is also consistent with interests of fairness and predictability in the tax laws. This regulation was inconsistent with prior judicial interpretation of the statutes. *See Brown*, 63 F.2d at 916-17 (leaving the question of the timeliness of the renunciation entirely to local law without imposing a "reasonable time" requirement); Comment to Tentative Draft No. 11 § X1007(h), at 33. While the Commissioner's interpretation of the tax laws through regulations is entitled to substantial deference, we should not, many years after the fact, construe this regulation so as to extend it beyond its plain language in a manner that overrules otherwise governing case law upon which taxpayers have doubtless relied. Perhaps this is why the Commissioner has not directly relied upon the prior regulation on this appeal.

The Supreme Court "retroactively" applied the 1958 regulation to the 1972 disclaimer of interests created by a 1939 testamentary trust in *Jewett*, 455 U.S. at 316-18. However, the disclaimed interests in *Jewett* were plainly "property transferred from a decedent," and thus the taxpayer had fair warning fourteen years before his disclaimers that the regulation might apply. Here, on the other hand, the regu-

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in section X1007(h) because it was felt that the equities in favor of relieving from the gift tax a person who renounces a testamentary transfer applied equally to the renouncer of an inter vivos gift.

Since Congress had only addressed the question of testamentary disclaimers in the 1954 Code, this may explain why the Commissioner decided to leave the issue of inter vivos disclaimers to Congress or the courts. Congress ultimately resolved the issue in § 2518, though only prospectively.

lation was inapplicable on its face to Mrs. Irvine's contingent remainder interest in an inter vivos trust. With the regulation inapplicable, the fededal tax effects of Mrs. Irvine's 1979 disclaimer of that interest was governed by state law. Since the Commissioner concedes that her disclaimer was effective under Minnesota law, we must affirm.

McMILLIAN, Circuit Judge, with whom LAY and BRIGHT, Senior Circuit Judges, and JOHN R. GIBSON, Circuit Judge, join, dissenting.

I do not agree with the analysis of the majority opinion and accordingly dissent. I think the majority opinion's interpretation of "taxable transfer" as a transfer made after the enactment of the federal gift tax is too narrow.

"TAXABLE TRANSFER"

The majority opinion holds that Treasury Regulation § 25.2511-1(c)(2) is inapplicable because the trust which created Mrs. Irvine's contingent remainder interest pre-dated the enactment of the federal gift tax in 1932 and thus was not a "taxable transfer," that is, a transfer to which the federal gift tax is, or would have been, applicable. I would instead follow the analysis in *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990) (*Ordway*), *cert. denied*, 111 S. Ct. 2916 (1991). As noted by the majority opinion, the facts in *Ordway* and in the present case are virtually identical. In *Ordway* the Eleventh Circuit acknowledged that the original trust was not taxable, that is, in the sense it was not subject to federal gift tax, but concluded that it was a "taxable transfer" because, "[f]or the purposes of

measuring time, . . . a taxable transfer occurs whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." *Id.*, *citing* 26 C.F.R. § 25.2511 (c)(1), .2815-2(c)(3). Thus, I would hold in the present case that the original trust can be considered a "taxable transfer" for purposes of determining whether Mrs. Irvine's partial disclaimer was made within a reasonable time for purposes of Treasury Regulation § 25.2511-1(c)(2).

In my view, the meaning of the term "taxable transfer" has less to do with liability for federal gift tax than with determining whether a completed gift has been made for federal gift tax purposes, regardless of whether a federal gift tax is actually imposed on that transaction. For this reason, I do not think the citation to the annual gift tax exclusion regulation, 26 C.F.R. § 25.2815-2(c)(3), is inapposite. What is critical in the present case is whether there was a completed gift, not the reason why no federal gift tax is incurrd with respect to that particular transfer. In other words, as long as the transfer effected a completed gift of property, then the transfer is a "taxable transfer," even though the transfer may not be subject to federal gift tax.

Interpreting "taxable transfer" to refer to whether the transfer effected a completed gift subject to federal gift tax, regardless of whether there was a federal gift tax at the time of the transfer, is supported by a close examination of the structure of the two Treasury regulations in question. Treasury Regulation § 25.2511-1, and § 25.2518 by cross-reference, defines transfers to which the federal gift tax applies and does not apply. For example, gifts of some kinds

of property by nonresidents who are not citizens of the United States are not subject to federal gift tax. *Id.* § 25.2511-1(b). If a husband and wife file a joint income tax return for a tax year, the payment by one spouse of all or part of the income tax liability for that year is not a transfer subject to federal gift tax. *Id.* § 25.2511-1(d). The regulations describe other types of transfers that are not subject to federal gift tax: transfer of bare legal title to a trustee, transfer for a full and adequate consideration in money or money's worth, or to ordinary business transactions. *Id.* § 25.2511-1(g)(1).

Of special interest in the present case, indirect transfers, effected by means of disclaimers or refusals to accept ownership of property, are transfers subject to federal gift tax: "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax." *Id.* § 25.2511-1(c); *Jewett v. Commissioner*, 455 U.S. 305, 310 (1982) (indirect transfer, by means of disclaimer, of contingent future interest in trust could be treated as taxable gift); *McDonald v. Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989). However, certain disclaimers are not transfers subject to federal gift tax. Section 25.2511-1(c) differentiates between disclaimers of interests created by "taxable transfers" before January 1, 1977, or after December 31, 1976, because the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, established specific uniform standards for determining whether a disclaimer constitutes a taxable gift and the effective date for the disclaimer provisions was December 31, 1976. *Id.* § 2009(e)(2).

Thus, in order to determine the validity of disclaimers for federal gift tax purposes, the relevant date is December 31, 1976. In my view, § 25.2511-1(c)(2) and § 25.2518 are complementary regulations: interests created by "taxable transfers" made after December 31, 1976, are subject to the "new" uniform standards established by the 1976 Act and § 25.2518, while interests created by "taxable transfers" before January 1, 1977, are subject to the "old" standards set forth in § 25.2511-1(c)(2). In the present case the 1976 standards and § 25.2518 do not apply because the contingent remainder interest which Mrs. Irvine disclaimed was created when the original trust was established in 1917, before January 1, 1977.

In my view, whether or not the interest created was established before the enactment of the federal gift tax is irrelevant; the key is whether the interest was created by a "taxable transfer," that is, a completed gift. The original trust effected a completed gift for federal gift tax purposes, even though it necessarily pre-dated the enactment of the federal gift tax, and thus was "taxable," even though it was not subject to federal gift tax. It was not a transfer to which the federal gift tax was not otherwise applicable, for example, a transfer for a full and adequate consideration in money or money's worth. Such a transfer would not have been a "taxable transfer" for federal gift tax purposes, regardless of whether it occurred before or after the enactment of the federal gift tax, because it was not a completed gift. Mrs. Irvine did not buy her contingent remainder interest; her grandfather gave it to her. For this reason, I would hold that the 1917 trust was a "taxable transfer" for purposes of determining the valid-

ity of the disclaimer of an interest created by it, even though it was not subject to federal gift tax.

The thrust of the majority opinion in disregarding the Eleventh Circuit's analysis in *Ordway* relates to, in my judgment, a misunderstanding of the *Ordway* opinion and the government's contention in the present case. The majority opinion's reasoning is that the government seeks to apply the gift tax retroactively to transfers made prior to June 6, 1932. In attempting to distinguish Treasury Regulation § 25.2511-1(c)(2) and Judge Frank Johnson's reasoned analysis in the *Ordway* case, the majority opinion relies upon *Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952). I respectfully submit such reliance is misplaced.

Treasury Regulation § 25.2518-2(c)(3) reads: "With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." The majority opinion urges that the Eleventh Circuit misapplies this regulation, because it is concerned "with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers." This completely distorts the meaning and purpose of the regulation. The Commissioner has simply declared that a donor can create a "taxable transfer," even if it is *not* subject to a tax, existing or not existing at the time of the transfer, if there happens "any transaction in which an interest in property is gratuitously passed or conferred upon another," 26 C.F.R. § 25.2511(c)(1).[1] Thus, even though the creation

[1] "The IRS's understanding of the terms of the Code is entitled to considerable deference." *United States v. National Bank of Commerce*, 472 U.S. 713, 730 (1985).

of the trust in 1917 was not taxable, it can still be viewed, in applying the Gift Tax Act to transfers of property interests after 1932, as a "taxable transfer."

The majority opinion suggests that the *Ordway* opinion of the Eleventh Circuit has taken Treasury Regulation § 25.2518-2(c)(3) out of context. This is not true. The reference to the $10,000 annual exclusion on gifts in § 25.2518-2(c)(3) is merely *an illustration* of how a taxable transfer may occur when there is a completed gift regardless of whether the gift tax is imposed on the completed gift. Treasury Regulation § 25.2518-2 is directed to § 2518(a) of the Internal Revenue Code which deals with the question of how a qualified disclaimer may take place. Subsection 3 of § 25.2518-2 relates to the new nine-month period for making a disclaimer which is now described in § 25.2518-2(c)(1). The flow of the entire language relates to inter vivos transfers and provides the Commissioner's declaration that as to inter vivos transfers a taxable transfer can take place regardless of whether a gift tax is imposed upon the completed gift.

In the present case the government has not attempted to impose a gift tax on the original transfer in trust made in 1917. The taxable transfer in the present case relates solely to Mrs. Irvine's indirect transfer resulting from the disclaimer in 1979. There is no attempt to tax the 1917 bequest and the tax upon the indirect transfer resulting from the disclaimer is not in any way dependent upon the original transfer in trust made by Mrs. Irvine's grandfather in 1917. *See Jewett v. Commissioner*, 455 U.S. 305.[2]

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[2] Congress has expressly stated that the gift tax shall not be given retroactive application. Revenue Act of 1932, ch.

The majority opinion attempts to analogize the creation of the Ordway trust in 1917 to the transfers pursuant to the 1931 antenuptial agreement at issue in *Commissioner v. Copley's Estate.* This is a complete *non sequitur.* The facts of *Commissioner v. Copley's Estate* are clearly distinguishable. In that case an antenuptial agreement was executed in 1931 between a man and a woman who were married later that year. The husband agreed to pay a sum of one million dollars to his wife payable upon demand at any time after they were married. In 1936 and in 1944, pursuant to the 1931 agreement, the husband transferred $500,000 in securities on each occasion. The Internal Revenue Service attempted to tax these transfers under the Gift Tax Act of 1932. However, the court held that this would require a retroactive application of the gift tax because the transfers made in 1936 and 1944 were simply discharging a contractual debt or obligation which the husband owed to his wife pursuant to the 1931 agreement. On this basis, the Seventh Circuit held that application of the 1932 gift tax act was impermissible because it would apply the gift tax act on a retroactive basis. Contrary to the majority opinion's reasoning, "the creation" of the Ordway trust in 1917 does not fall into the "same category." In *Commissioner v. Copley's Estate*, the transfers made in 1936 and 1944 were not subject to the gift tax because they constituted payments of an obligation under the 1931 agreement. In the present case, the disclaimer made by the taxpayer in 1979 is the transaction which *is* taxable. Be-

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209, § 501(b), 47 Stat. 169, 245 (1932). In support of its holding, the majority opinion seeks to inject the issue of retroactivity into this case where none actually exists.

cause Lucius Ordway made the original gift before January 1, 1977, 26 C.F.R. § 25.2511-1(c)2 applies. Under this regulation the disclaimer of interest made in 1979 is subject to the federal gift tax unless the disclaimer was valid under state law and was made within a reasonable time of the knowledge of the existence of the transfer.

As I now discuss, I would follow the original panel majority opinion as to the merits of the validity of the disclaimer.

DISCLAIMER WITHIN A REASONABLE TIME

As noted above, because the interest disclaimed by Mrs. Irvine was created by a taxable transfer before January 1, 1977, her disclaimer is subject to federal gift tax unless it was valid under state law and was "made within a reasonable time after knowledge of the existence of the transfer." 26 C.F.R. § 25.2511-1 (c)(2). It is undisputed that the disclaimer was valid under Minnesota law. What is disputed it whether the disclaimer was made within a reasonable time. This issue is a familiar one. *See Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (banc); *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973), *overruled by Jewett v. Commissioner*, 455 U.S. 305. I agree with the government's argument that Mrs. Irvine's disclaimer was not "made within a reasonable time after knowledge of the existence of the transfer." The "reasonable time" during which Mrs. Irvine could have made a disclaimer began to run in 1931, when she first learned of her interest, and not in 1979, when her interest vested upon the death of the last life beneficiary. Because Mrs. Irvine did not disclaim her contingent remainder inter-

est until 1979, some 48 years after she learned of its existence, her disclaimer was not effective.

In *Jewett v. Commissioner* the taxpayer's grandmother died in 1939, leaving the bulk of her estate in a testamentary trust. Under the terms of the trust, the trust income was payable to her husband for life and thereafter to the taxpayer's parents. Upon the death of the surviving parent, the trust was to be divided equally among her grandchildren then living or, if any grandchild had died, to that grandchild's child or children. In 1972, some 33 years after the creation of the trust and when the taxpayer's mother, who was one of the life beneficiaries, was still alive, the taxpayer disclaimed his interest in the trust. The taxpayer argued that the word "transfer" in the Treasury regulation referred to the vesting or distribution of property and that the "reasonable time" during which he could make a disclaimer did not begin to run until that interest vested upon the death of the last surviving life tenant. *See Keinath v. Commissioner*, 480 F.2d at 63-64 (holding that time within which disclaimer of vested remainder interest subject to divestiture must be filed begins to run when interest becomes indefeasibly fixed both in quality and quantity, that is, after death of life beneficiary, not testator). The Supreme Court rejected the taxpayer's interpretation and held that the relevant "transfer" referred to in the regulation occurred when the disclaimed interest was created and not later when that interest vested. 455 U.S. at 312, 318-19. The Court held that the taxpayer's disclaimer in 1972 was not made within a reasonable time of either the creation of the interest, some 33 years before, or when he reached the age of majority, some 24 years before. *Id.* at 318.

Thus, under *Jewett v. Commissioner*, the "reasonable time" during which Mrs. Irvine would have made a disclaimer began to run, at the latest, in 1931, when she became aware of her remainder interest and when she turned 21. Mrs. Irvine's partial disclaimer in 1979, some 48 years later, was clearly too late. This is twice as long as the period which the Supreme Court rejected in *Jewett v. Commissioner*. *Id.* (disclaimer 24 years after majority); *Ordway*, 908 F.2d at 895 (disclaimer made 38 years after knowledge of transfer and 36 years after age of majority). Moreover, the predecessor to the 1986 regulation was promulgated in 1958, well in advance of the 1979 disclaimer. The substantive requirement in the 1958 regulation that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer" was not changed in 1986. Certainly the adoption of the regulation in 1958 was sufficient to put Mrs. Irvine on notice that an "unreasonable" delay in refusing to accept ownership would not be effective for gift tax purposes. Even assuming the "reasonable time" period did not begin to run until 1958, Mrs. Irvine did not act until 1979, some 21 years later. *Cf. Jewett v. Commissioner*, 455 U.S. at 316 n.17 (citing *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.) (renunciation 8 years later was effective under state law but was considered unacceptable for federal tax purposes), *cert. denied*, 290 U.S. 641 (1933), 317 n.20 (taxpayer did not renounce interest until 14 years after adoption of 1958 regulation). In addition, it makes no difference for federal gift tax purposes that Mrs. Irvine's interest remained contingent until the death of her aunt, the last life beneficiary, in 1979. *Jewett v. Commissioner*,

455 U.S. at 317-18 (comparing disclaimer of contingent remainder to exercise of general power of appointment, which is a taxable transfer); *Ordway*, 908 F.2d at 893 n.4.

FAIRNESS

In 1979 *Keinath v. Commissioner*, which was decided in 1973 and in which the government did not seek certiorari, was the rule in this circuit. *Keinath v. Commissioner* held that the time within which the disclaimer must be filed begins to run when the remainder interest becomes "indefeasibly fixed in both quality and quantity" and that remainder interests subject to divestment did not become "indefeasibly fixed" until the death of the life beneficiary. 480 F.2d at 63. Thus, under *Keinath v. Commissioner* a disclaimer could be filed within a reasonable time of the death of the life beneficiary. *Id.* In the present case, the last life beneficiary died in June 1979 and Mrs. Irvine filed her partial disclaimer only two months later in August 1979, which was clearly "within a reasonable time" under the *Keinath v. Commissioner* rule. In 1980 this circuit affirmed *Keinath v. Commissioner* en banc in *Cottrell v. Commissioner*, 628 F.2d 1127. It was not until *Jewett v. Commissioner*, in 1982, two years later, that the Supreme Court changed the disclaimer rule and overruled *Keinath v. Commissioner*.

It does seem unfair to apply a rule announced in 1982 to a disclaimer which was valid under the applicable law when it was made in 1979. However, to the extent that the unfairness is due to the fact that at the time the new rule was announced, it was already too late to act, a similar retroactivity argu-

ment was rejected by the Supreme Court in *Jewett v. Commissioner*, 455 U.S. at 317 (rejecting taxpayer's argument that it was unfair to apply a 1958 regulation to an interest created in 1939). Moreover, to the extent that the unfairness is due to the fact that the disclaimer when it was made was valid under this circuit's case law, one must nevertheless acknowledge that that case law was subsequently overruled by the Supreme Court. This is the unavoidable, albeit in the present case expensive, consequence of our heirarchical court system. This court is an intermediate appellate court, and our decisions can be overruled by the Supreme Court.

In sum, I would hold that the original trust was a "taxable transfer" and that the disclaimer was not made within a reasonable time. Accordingly, I would reverse the order of the district court and would remand the case to the district court for further proceedings on the valuation issue.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5616

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the ESTATE OF SALLY O. IRVINE, APPELLEES

v.

UNITED STATES OF AMERICA, APPELLANT

Appeal from the United States District Court
for the District of Minnesota

Submitted: September 10, 1991

Filed: June 10, 1991

Before McMILLIAN, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, Circuit Judge.

McMILLIAN, Circuit Judge.

The United States (hereinafter the government) appeals from a final order entered in the District Court for the District of Minnesota granting sum-

mary judgment in favor of John O. Irvine and First Trust National Association (hereinafter taxpayers) as the personal representatives of the Estate of Sally Ordway Irvine (hereinafter Mrs. Irvine) and directing the government to refund federal gift taxes and interest paid by Mrs. Irvine for the third quarter of 1979 and the third quarter of 1980. For reversal, the government argues the district court erred in holding that Mrs. Irvine's partial disclaimer in 1979 of a remainder interest in a trust created by her grandfather in 1917 was not subject to federal gift tax. For the reasons discussed below, we agree with the government. Accordingly, we reverse the order of the district court and remand the case to the district court for further proceedings.

BACKGROUND FACTS

The underlying facts are not disputed. Mrs. Irvine was a granddaughter of Lucius P. Ordway. In January 1917 Lucius P. Ordway established an irrevocable inter vivos trust. The trust income was to be paid to Ordway's wife, Jessie G. Ordway, and their five children for their lives. The trust also provided that if any of Ordway's children died before the termination of the trust, that child's issue and his or her surviving spouse, as long as he or she remained unmarried, would receive the child's share of the trust income. On the death of the last surviving life beneficiary, the trust corpus was to be distributed to the grandchildren, per capita. If any of the grandchildren died with issue before the termination of the trust, that grandchild's share would be distributed to his or her surviving issue, per stirpes. Mrs. Irvine became aware of her interest in the trust when she turned 21 in 1931.

In June 1979 Katharine G. Ordway, who was Mrs. Irvine's aunt and the last surviving child of Lucius P. Ordway, died unmarried, and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at the time of Katharine G. Ordway's death. Because one grandchild had died with issue, the trust corpus was to be divided into thirteen shares. On August 17, 1979, about two months after Katharine G. Ordway's death but 48 years after Mrs. Irvine had become aware of her interest in the trust, Mrs. Irvine disclaimed part of her share in the trust corpus. It is undisputed that Mrs. Irvine's partial disclaimer was valid under Minnesota law. Minn. Stat. Ann. § 501.211 (West 1989) (valid disclaimer if filed in Minnesota district court within six months of event which causes disclaimant to be finally ascertained and interest indefeasibly fixed) (repealed by 1989 Minn. Laws, ch. 340, art. I, § 70 (codified at Minn. Stat. Ann. § 501B.86 (West 1990) (within nine months) (effective Jan. 1, 1990)). By virtue of the partial disclaimer, Mrs. Irvine's five children received, per stirpes, the disclaimed portion of her share of the trust corpus.

In November 1979 Mrs. Irvine filed a third quarter gift tax return reporting the disclaimer but stating that the partial disclaimer was not a transfer subject to the gift tax. Following an IRS audit of that return, Mrs. Irvine filed an amended gift tax return in March 1982, reported the partial disclaimer as a taxable transfer, and paid the gift tax due, $7,468,671.00. In April 1982 she paid an additional $2,086,627.51 in accrued interest on the deficiency. In the meantime, in August 1980, Mrs. Irvine had created a charitable remainder annuity trust and transferred $120,000.00 to the First Trust Co. of St.

Paul as trustee. This transfer was a taxable gift to the income interest under the annuity (determined to be $75,337.00 under the applicable Treasury regulations). In November 1980 Mrs. Irvine filed a 1980 third quarter gift tax return reporting the transfer to the trust company as a taxable gift. Because the tax due on the transfer, $15,427.62, was offset by Mrs. Irvine's remaining unified credit against estate and gift taxes, the 1980 third quarter gift tax return showed no gift tax due. In June 1982 the IRS notified Mrs. Irvine that because the adjustments made to her 1979 third quarter gift tax return on account of the partial disclaimer had reduced the amount of unified credit available to her by $38,000.00, she owed an additional $44,035.90 in gift taxes for the transfer to the annuity trust. In September 1982 Mrs. Irvine paid the additional taxes due and accrued interest ($10,959.51).

In 1984 Mrs. Irvine filed timely claims for refunds of the gift taxes and interest paid. In March 1987 the IRS disallowed the refund claims. Mrs. Irvine died on November 1, 1987.

PROCEEDINGS IN DISTRICT COURT

In February 1988 taxpayers, as the personal representatives of Mrs. Irvine's estate, filed the present action against the government in federal district court seeking a refund of the gift taxes and interest paid. 26 U.S.C. § 7422; 28 U.S.C. § 1346(a)(1). Taxpayers also alleged that the value of the disclaimed remainder interest had been overstated in the 1979 third quarter gift tax return. The parties filed cross-motions for summary judgment. The government argued that the 1979 partial disclaimer was

a transfer subject to federal gift tax because it had not been made "within a reasonable time after knowledge of the existence of the transfer" as required by Treasury Regulation § 25.2511-1(c). The government cited in support *Jewett v. Commissioner*, 455 U.S. 305 (1982) (*Jewett*). Taxpayers disagreed and argued that the gift tax did not apply because the Ordway trust pre-dated the enactment of the gift tax in 1932 and the gift tax applies prospectively only, 26 U.S.C. § 1000. Taxpayers argued that *Jewett* was distinguishable from the present case because the trust in *Jewett* had been established in 1939, well after the enactment of the gift tax. Taxpayers argued in the alternative that *Jewett* had been wrongly decided. Following a hearing on the cross-motions for summary judgment, the district court held that the 1979 partial disclaimer was not a taxable transfer and granted summary judgment in favor of taxpayers. The district court agreed with taxpayers' argument that the gift tax could not be applied retroactively to tax pre-1932 transfers. Slip op. at 8. The district court distinguished *Jewett* because that case involved a 1939 transfer and thus did not involve any question of retroactive application. *Id.*, *citing Ordway v. United States*, No. 87-81877-CIV-TES (S.D. Fla. Mar. 13, 1989), *rev'd*, 908 F.2d 890 (11th Cir. 1990) (*Ordway*), *petition for cert. filed*, 59 U.S.L.W. 3687 (U.S. Mar. 27, 1991) (No. 90-1503).[1] The district court further noted that Mrs. Irvine's remainder interest remained

[1] The district court did not of course have the benefit of the appellate opinion in *Ordway v. United States* at the time it decided the present case in September 1989. The Eleventh Circuit did not decide *Ordway v. United States* until August 1990.

contingent until the death of her aunt in 1979. Slip op. at 9-10. The district court directed the government to refund the gift taxes and interest paid for both the third quarter of 1979 and 1980 because the reduction in the unified credit at issue in the 1980 return had been premised upon the invalidity of the 1979 partial disclaimer. This appeal followed.

STANDARD OF REVIEW

We review de novo the district court's decision to grant summary judgment. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *see, e.g., McCuen v. Polk County*, 893 F.2d 172, 173 (8th Cir. 1990). In the present case, the relevant facts are not disputed. The issue on appeal is a legal one—whether Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in a trust created in 1917 was a transfer subject to the federal gift tax.

APPLICABILITY OF GIFT TAX TO INTEREST CREATED BEFORE 1932

"Federal gift tax is imposed 'on the transfer of property by gift.'" *McDonald v. Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988) (*McDonald*) (citing 26 U.S.C. § 2501(a)(1)), *cert. denied*, 490 U.S. 1005 (1989). "The scope of this tax is broad, applying 'whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.'" *McDonald*, 853 F.2d at 1499, *citing* 26 U.S.C. § 2511(a). "A trust beneficiary's refusal to

accept ownership of property may constitute an indirect gift to a successor in interest subject to federal gift tax liability." *Jewett*, 455 U.S. at 306. "Under Treasury Regulation 26 C.F.R. § 25.2511-1 (c), however, such a refusal is not subject to tax if it is effective under local law and made 'within a reasonable time after knowledge of the existence of the transfer.'" *Id.* "The effect of these disclaimer provisions is to collapse the entire transaction into a single transfer from the original power to the ultimate recipient, thereby ignoring the gift tax consequences of the intermediate disclaimer." *McDonald*, 853 F.2d at 1499, *citing Kennedy v. Commissioner*, 804 F.2d 1332, 1334 (7th Cir. 1986).

The government argues that retroactive application of the gift tax is not the real issue because it seeks to impose the gift tax on the 1979 partial disclaimer, not the inter vivos transfer that created the trust in 1917, and that the present case cannot be meaningfully distinguished from *Jewett*. In *Ordway* the Eleventh Circuit agreed with the government's argument and held that the gift tax did apply to the disclaimer of an interest created before its enactment in 1932. 908 F.2d at 893-95. The facts in the present case and *Ordway* are identical, except that the disclaiming individual in *Ordway* was Mrs. Irvine's brother. We agree with the Eleventh Circuit's analysis and accordingly hold that gift tax does apply to the disclaimer of an interest created before 1932.

We agree with the Eleventh Circuit that the fact that the creation of the Ordway trust in 1917 predated the enactment of the federal gift tax in 1932 is not dispositive. *Ordway*, 908 F.2d at 893. Although Congress first passed a federal gift tax in 1924, the Supreme Court held it was unconstitutional

because it imposed a tax on transfers made before the date of the act. *See id.* (citations omitted). For this reason, the first valid gift tax statute, passed in 1932, expressly provided that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169. In the present case, as in *Ordway*, the government does not seek to tax the transfers that created the Ordway trust in 1917; it seeks to tax Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in the trust, an indirect transfer which occurred well after both the enactment of the gift tax in 1932 and Treasury Regulation § 25.2511-1(c), which was originally promulgated in 1958.

TAXABLE TRANSFER

Retroactivity is also implicated in another aspect of the present case. As promulgated in 1958, Treasury Regulation § 25.2511-1(c) provided in part that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be must [*sic*] unequivocal and effective under the local law." Subsequently, in 1976, Congress enacted § 2518 of the Internal Revenue Code, providing that a "qualified" disclaimer of any interest in property would not be treated as a taxable transfer but "as if the interest had never been transferred to [the disclaimant at all]," and replacing the "reasonable time" requirement with the requirement that "qualified" disclaimers must be made within nine months of the later of either the transfer creating the disclaimed interest or the disclaimant's

twenty-first birthday. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b)(1), 90 Stat. 1893 (*codified at* 26 U.S.C. § 2518(b)). However, the "qualified" disclaimer provision and the specific time limits apply only to interests created after December 31, 1976, the effective date of the act. *See* Treasury Regulation § 25.2518-1(a). Treasury Regulation § 25.2511-1(c) was amended in 1986, and § 25.2511-1(c)(2) (emphasis added) now provides in part that

> [i]n the case of *taxable transfers* creating an interest in the person disclaiming made before January 1, 1977, . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law.

Taxpayers argue § 25.2511-1(c)(2) cannot apply to Mrs. Irvine's partial disclaimer because her remainder interest was not created by a "taxable transfer." Taxpayers argue that the creation of the Ordway trust could not have been a "taxable transfer" because, as noted above, there was no gift tax when the Ordway trust was created in 1917. We disagree because Treasury Regulation § 25.2518-2(c)(3) provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." Thus, a "taxable transfer" occurs whenever there is " 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." *Ordway*, 908 F.2d at 895, *citing* 26 C.F.R.

§ 25.2511(c)(1). We agree with this interpretation and hold that the term "taxable transfer" in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax.

DISCLAIMER WITHIN A REASONABLE TIME

Because the interest disclaimed by Mrs. Irvine was created by a taxable transfer before January 1, 1977, the disclaimer is subject to gift tax unless it was valid under state law and was "made within a reasonable time after knowledge of the existence of the transfer." It is undisputed that the disclaimer was valid under Minnesota law. What is disputed is whether the disclaimer was made within a reasonable time. This issue is a familiar one. *See Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (banc) (*Cottrell*); *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (*Keinath*), *overruled by Jewett v. Commissioner*, 455 U.S. 305 (1982); *cf. McDonald*, 853 F.2d 1494 (joint tenancy). The government argues that the disclaimer was not "made within a reasonable time after knowledge of the existence of the transfer" because Mrs. Irvine did not disclaim her remainder interest until 1979, some 48 years after she learned of its existence. The government argues that, under *Jewett*, the "reasonable time" during which Mrs. Irvine could have made a disclaimer began to run in 1931, when Mrs. Irvine learned of her remainder interest, and not in 1979, when her interest vested upon the death of the last life beneficiary. We agree.

In *Jewett* the taxpayer's grandmother died in 1939, leaving the bulk of her substantial estate in a testamentary trust. Under the terms of the trust, the

trust income was payable to her husband for life and thereafter to the taxpayer's parents. Upon the death of the surviving parent, the trust was to be divided equally among her grandchildren then living or, if any grandchild had died, to that grandchild's child or children. In 1972, some 33 years after the creation of the trust and when the taxpayer's mother, who was one of the life beneficiaries, was still alive, the taxpayer disclaimed his interest in the trust. The taxpayer argued that the word "transfer" in the Treasury regulation referred to the vesting or distribution of the property and that the "reasonable time" during which he could make a disclaimer did not begin to run until that interest vested upon the death of the last surviving life tenant. *See Keinath*, 480 F.2d at 63-64 (holding that time within which disclaimer of vested remainder interest subject to divestiture must be filed begins to run when interest becomes indefeasibly fixed both in quality and quantity, that is, after death of life beneficiary, not testator). The Supreme Court rejected the taxpayer's interpretation and held that the relevant "transfer" referred to in the regulation occurred when the disclaimed interest was created and not later when that interest vested. 455 U.S. at 312, 318-19. The Court held that the taxpayer's disclaimer was not made within a reasonable time of either the creation of the interest, 33 years before, or when he reached the age of majority, 24 years before. *Id.* at 318.

Thus, under *Jewett*, the "reasonable time" during which Mrs. Irvine could have made a disclaimer began to run, at the latest, in 1931 when she became aware of her remainder interest and when she turned 21. Mrs. Irvine's partial disclaimer in 1979, some 48 years later, was clearly too late. This is twice as

long as the period which the Supreme Court rejected in *Jewett*. 455 U.S. at 318 (disclaimer made 24 years after age of majority); *see Ordway*, 908 F.2d at 895 (disclaimer made 38 years after knowledge of transfer and 36 years after age of majority).

The district court also based its decision in part on the fact that Mrs. Irvine's remainder interest remained contingent until the death of her aunt, the last life beneficiary, in 1979. However, *Jewett* rejected the argument that "the disclaimer of a contingent remainder is not a taxable event." 455 U.S. at 317-18 (comparing disclaimer of contingent remainder to exercise of general power of appointment, which is a taxable transfer); *see Ordway*, 908 F.2d at 893 n.4.

RETROACTIVE APPLICATION OF *JEWETT*

Having concluded that the disclaimer of an interest created before the gift tax was enacted is a taxable transfer and that the disclaimer was not made "within a reasonable time," we now face another retroactivity issue, that is, whether it is appropriate to apply the "reasonable time" rule in *Jewett*, which was decided in 1982, to a partial disclaimer made in 1979. In 1979 *Keinath*, which was decided in 1973 and in which the government did not seek certiorari, was the rule in the Eighth Circuit. *Keinath* held that the time within which the disclaimer must be filed begins to run when the remainder interest becomes "indefeasibly fixed in both quality and quantity" and that remainder interests subject to divestment did not become "indefeasibly fixed" until the death of the life beneficiary. 480 F.2d at 63. Thus, under *Keinath*, a disclaimer could be filed within a reasonable time

of the death of the life beneficiary. *Id.* In the present case, the last life beneficiary died in June 1979 and Mrs. Irvine filed the partial disclaimer only two months later in August 1979 which was clearly, "within a reasonable time" under the *Keinath* rule. In 1980 we affirmed *Keinath* en banc in *Cottrell*, 628 F.2d 1127. It was not until the decision in *Jewett*, some two years later, that the disclaimer rule was changed and *Keinath* was overruled.

As in *Ordway*, 908 F.2d at 896, neither the government nor taxpayers addressed this retroactivity issue on appeal in the present case. In *Ordway* the court decided that because non-retroactivity was an affirmative defense, the taxpayers' failure to raise that defense constituted a waiver and applied *Jewett* retroactively. *Id. But see id.* at 896-97 (Gibson, J., dissenting) (unfair to apply *Jewett* retroactively to 1979 disclaimer when to do so means taxpayer "will suffer severe tax consequences for failing to do something at a time when the law provided him with no notice that he needed to act"). We also decline to reach this issue.[2]

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[2] It does seem unfair to apply a rule announced in 1982 to a disclaimer which was valid under the applicable law when it was made in 1979. However, to the extent that the unfairness is due to the fact that at the time the new rule was announced, it was already too late to act, we note that a similar retroactivity argument was rejected by the Supreme Court in *Jewett v. Commissioner*, 455 U.S. 305, 317 (1982) (*Jewett*). In *Jewett* the taxpayer argued that it was unfair to apply a 1958 regulation "retroactively" to an interest that had been created in 1939. The taxpayer argued that at the time the regulation was promulgated, it was already too late, at least according to the government, to disclaim the interest. The Court held there was no retroactivity problem because the taxpayer's argument was "based on an assumption that

Accordingly, the order of the district court is reversed and the case is remanded to the district court for further proceedings on the valuation issue.

BRIGHT, Senior Circuit Judge, concurring in the result.

I agree that Mrs. Irvine's disclaimer was not valid for federal gift tax purposes. Very simply put, the 1917 gift from Lucius P. Ordway in trust to his wife and heirs constituted a taxable transfer as that term is defined under the applicable gift tax laws and regulations. *See* Treas. Reg. § 25.2518-2(c)(3) (1990). "With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift."

[he] had a 'right' to renounced the interest without tax consequences that was 'taken away' by the 1958 Regulation," but the taxpayer "never had such a right." *Id.* The Court further noted that the regulation had been adopted "well in advance" of the disclaimers.

In the present case, the partial disclaimer was valid under the applicable law in effect at that time; however, the Supreme Court subsequently held in *Jewett* that the applicable law, that is, this court's decision in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (*Keinath*), was incorrect. This is the unfortunate but unavoidable, and in the present case, admittedly costly, consequence of our hierarchical court system. This court is an intermediate appellate court and our decisions are subject to review and to being overruled by the Supreme Court. *Compare Poinier v. Commissioner*, 858 F.2d 917, 918-19 (3d Cir. 1988) (sister's disclaimer held untimely under *Jewett*), *cert. denied*, 490 U.S. 1019 (1989), *with Cottrell v. Commissioner*, 628 F.2d 1127, 1129 (8th Cir. 1980) (banc) (sister's disclaimer held timely under *Keinath*; same family involved in *Poinier v. Commissioner*).

Id. Thus, "taxable transfer", as used in the regulation, merely describes a class of interests to which the regulation applies based upon the nature of the transactions creating them. It is not meant to literally refer solely to transfers in which gift taxes were assessed. Therefore, under Treas. Reg. § 25.2511-1(c)(2) (1990),[1] Mrs. Irvine's remainder interest was subject to the federal gift tax unless her disclaimer, as to the portion here in question, was timely.

Pursuant to *Jewett v. Commissioner*, 455 U.S. 305 (1982), the time period for Mrs. Irvine to disclaim her interest began to run, at the latest, in 1931 when she was aware of her remainder interest and had reached the age of majority. Clearly, Mrs. Irvine's

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[1] Treas. Reg. § 25.2511-1(c)(2) (1990) reads in pertinent part:

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transfered from a decedent . . ., a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. . . . There can be no refusal of ownership of property after its acceptance. In the absence of the facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.

Although this regulation read differently at the time Mrs. Irvine made her disclaimer, absent a contrary indication from the Secretary of the Treasury, tax regulations apply retroactively to the year of the Tax Code they interpret, in this case—1976. *See* 26 U.S.C.A. § 7805(b) (West Supp. 1991).

partial disclaimer, almost fifty years later, was not made within a reasonable time. *See Jewett*, 455 U.S. at 318 (rejecting disclaimer made twenty-four years after reaching age of majority for federal gift tax purposes). Such a late disclaimer will not operate to avoid the application of the federal gift tax laws.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent. The question on which this case turns is whether Sally Irvine's 1979 partial disclaimer of her contingent remainder interest in an irrevocable trust created in 1917 (when there was no federal gift tax) is a transfer subject to the federal gift tax. The opinion of the Court holds that it is, based on the application of Treasury Regulation § 25.2511-1(c)(2), which provides:

> [i]n the case of *taxable transfers* creating an interest in the person disclaiming made before January 1, 1977 . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance.

Treas. Reg. § 25.2511-1(c)(2) (as amended in 1986) (emphasis added). This regulation reflects the unassailable premise that a disclaimer is not subject to the federal gift tax unless the transfer creating the interest disclaimed was a "taxable transfer" for purposes of the Gift Tax Act. I note without surprise that the Treasury Department has not promulgated any regulation dealing with the refusal to accept

ownership of interests created by "nontaxable transfers."

The transfer that created Mrs. Irvine's contingent remainder interest is the irrevocable inter vivos trust created by Lucius P. Ordway in 1917. If the establishment of this trust is indeed a "taxable transfer," even though in 1917 the federal gift tax had not yet been enacted, then Mrs. Irvine's disclaimer of her contingent remainder interest created by the trust would be subject to the federal gift tax unless her disclaimer was timely.[1] But if the creation of her interest by the 1917 Ordway trust is not a "taxable transfer," then the interest validly disclaimed by Mrs. Irvine under Minnesota law passes to her five children unencumbered by the federal gift tax.

It seems fundamental to me that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made. No such federal tax existed on January 16, 1917 when Lucius P. Ordway irrevocably transferred assets to the trustees of the Ordway trust and Mrs. Irvine's interest was created. Moreover, fifteen years later when the Gift Tax Act of 1932 was enacted, Congress expressed its intention not to apply the tax retroactively. Section 501(b) of the Act states: "The tax shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]." Revenue Act of 1932 § 501(b), 47 Stat. 169, 245. This prohibi-

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[1] The issue of timeliness is the subject of *Jewett v. Commissioner*, 455 U.S. 305 (1982). *Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here. It was beyond dispute in *Jewett* that the transfer creating an interest in the person disclaiming was a taxable transfer.

tion against retroactive application of the tax to pre-Act gifts has been continued throughout revisions of the Gift Tax Act and is reflected in the current Code in the section governing computation of the tax. 26 U.S.C. § 2502 (1988) (the tax is computed upon the aggregate sum of taxable gifts made throughout the donor's life during periods following June 6, 1932). "Congress has been careful to avoid any taint of retroactivity in connection with the 1932 [gift] tax and the subsequent amendments to the tax." C. Lowdnes, R. Kramer, J. McCord, *Federal Estate and Gift Taxes* 643 (3d ed. 1974).

However, where Congress has feared to tread the Eleventh Circuit has rushed in with its stunning determination that "the 1917 gift [of Lucius P. Ordway] was a taxable transfer." *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990), *petition for cert. filed*, No. 90-1503 (Mar. 27, 1991). The *Ordway* decision gives a new definition to the term "taxable transfer" by referring to section 25.2518-2(c)(3) of the regulations, which provides that "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." Treas. Reg. § 25.2518-2(c)(3). Based on that language, the *Ordway* decision concludes that "a taxable transfer occurs whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' 26 C.F.R. § 25.2511(c)(1) [sic], even if that transaction was not subject to the gift tax." 908 F.2d at 895.

The opinion of the Court in the case before us agrees with the *Ordway* court's interpretation of Treasury Regulation § 25.2518-2(c)(3) and holds,

ante at 7, that "the term 'taxable transfer' in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax." I cannot accept that startling conclusion. The Court's reliance on a single sentence from a regulation explicating a section of the Code that is clearly inapplicable to the facts here[2] is inappropriate and misplaced. Moreover, the sentence is taken out of context to support an expanded and illogical definition of the term "taxable transfer" to include a pre-Act transfer. This distorted interpretation is evident when the sentence is read in context with the sentence that immediately follows it: "[A] taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers. . . ." Treas. Reg. 25.2518-2(c)(3). Clearly, the sentence upon which the Eleventh Circuit and now our Court mistakenly rely is concerned with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers. There is a definitive difference between a taxable transfer that qualifies for the annual exclusion and on which a gift tax therefore is not imposed, such as an annual $10,000 check to a favorite nephew, and a transfer as to which the gift tax is not even applicable, such

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[2] Mrs. Irvine's disclaimer clearly is not governed by section 2518 of the Code. The interest she disclaims was created by a transfer in the year 1917. Section 2518 applies only to the disclaimer of interests created by taxable transfers made after December 31, 1976. Treas. Reg. § 25.2518-1(a)(1).

as a transfer pursuant to an obligation created in an antenuptial agreement executed in 1931 between a man and woman married later that year. *See Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) (holding that transfers made in 1936 and 1944 pursuant to the 1931 agreement were not taxable because "[t]o hold, as the Commissioner would have us do . . . would require a retroactive application of [the gift tax], which we think is not permissible. See Sec. 501(b) of the Revenue Act of 1932."). The creation of the Ordway trust in 1917 falls into the same category as the transfers pursuant to the 1931 antenuptial agreement in *Copley's Estate*; it is a transfer as to which the federal gift tax is inapplicable—and even more cleanly and clearly so than the post-1932 transfer pursuant to the 1931 agreement in *Copley's Estate*.

In light of the consistently expressed intent of Congress not to apply the gift tax retroactively to transfers made prior to June 6, 1932, I cannot join in the Court's holding that "the term 'taxable transfer' in Treasury Regulation § 25.2511-1(c)(2) can refer to a transfer made before the enactment of the gift tax." *Ante* at 7. Logic, history,[3] the expressed intent of Congress, and a straightforward reading of the regulations all join here to compel the opposite conclusion. Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917, it never was subject to the federal gift tax and therefore was never a "taxable transfer" for federal gift tax purposes. Once the pretense that by

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[3] The Supreme Court struck down, on Due Process grounds, the original federal gift tax (enacted in 1924) to the extent it attempted to tax transfers made prior to its effective date. *See Blodgett v. Holden*, 275 U.S. 142 (1927).

some mysterious alchemy the treasury regulations have transformed the non-taxable 1917 transfer into a taxable event is stripped away, the government is left without any authority (other than *Ordway*, which cannot withstand critical analysis) to support its position.

As the federal gift tax simply does not apply here, I forego discussion of the issues concerning the timeliness of the disclaimer and the retroactive application of *Jewett*. If the gift tax is inapplicable, as I believe it plainly is, then these are non-issues.

For the reasons stated, I would affirm the decision of the District Court in favor of the taxpayers.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. File No. 3-88-061

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the ESTATE OF SALLY O. IRVINE, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Sep. 18, 1989]

Phillip H. Martin, Esq., Faith L. Ohman, Esq., Mary J. Streitz, Esq., Dorsey & Whitney, 2100 First Bank Place East, Minneapolis, MN 55402; Cole Oehler, Esq., Richard H. Kyle, Esq., Briggs & Morgan, 2200 First National Bank Building, St. Paul, MN 55101, for the plaintiffs.

Thomas D. Sykes, Esq., Trial Attorney, Tax Division, U.S. Department of Justice, P.O. Box 683, Ben Franklin Station, Washington, D.C. 20044; Jerome G. Arnold, Esq., U.S. Attorney, 234 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401, for the defendant.

MEMORANDUM AND ORDER

This matter is before the court upon cross motions for summary judgment. For the reasons set forth below, the court grants plaintiffs' motion and denies defendant's motion.

FACTUAL BACKGROUND

The facts underlying this action are essentially undisputed. This is a tax refund action against the United States seeking refund of $9,628,293.92 in gift tax and interest assessed against Sally Ordway Irvine. Plaintiffs John O. Irvine and First Trust National Association have brought this action as co-representatives of Sally Irvine's estate and as sucessors-in-interest to her refund claims. The central issue in this motion is whether a written disclaimer executed by Sally Irvine on August 21, 1979, is legally effective. If the disclaimer is valid under the internal revenue code, then plaintiffs are entitled to the refund they seek.

Lucius Ordway, Sally Irvine's grandfather, created the trust at issue in this litigation on January 16, 1917, in Ramsey County, Minnesota. The trust instrument provided that the trust was to continue until the death of the survivor of Lucius Ordway's wife and five living children, John G. Ordway (Sally Irvine's father), Samuel G. Ordway, Lucius P. Ordway, Jr., Katherine Ordway, and Richard Ordway. From the income of the trust Lucius Ordway's wife received an annuity of $14,000, and the Ordway children (or after the child's death, the surviving spouse and issue) received any additional income in five equal shares. The trust instrument provided for

termination of the trust and distribution of the trust corpus as follows:

> Upon the death of the survivor of my wife and children, and the termination of the aforesaid trust, said trustees shall pay over and transfer the trust fund in equal shares to each of my grandchildren per capita and not per sturpes [sic]. If any of my grandchildren shall then have died leaving issue, said children shall be entitled to equal portions of the share of said deceased grandchild.

Sally Irvine was born on December 23, 1910, and was six years old when the trust was created. She reached majority on December 23, 1931. Katharine Ordway, the survivor of Lucius Ordway's wife and children, died on June 27, 1979. On that date, twelve grandchildren of the settlor were alive (including Sally Irvine), one grandchild had died leaving issue, and another grandchild had died without issue. Accordingly, each of the twelve living grandchildren and the issue of the deceased grandchild were entitled to receive a 1/13 share of the trust corpus.

Until the termination of the trust, Sally Irvine possessed a contingent remainder interest in the trust corpus. Her entitlement to a share of the trust principal was contingent on her survival beyond the date on which the survivor of Lucius Ordway's wife and children died. This contingency was satisfied upon the death of Katharine Ordway. On August 21, 1979, slightly over two months after Sally Irvine's interest became indefeasibly fixed in quantity and quality, Mrs. Irvine disclaimed 5/16 of her 1/13 interest in the trust corpus, and she filed a written disclaimer with the Ramsey County District Court. The Ramsey

County court concluded, in an order dated September 6, 1979, that the disclaimer was valid under Minnesota law.

On audit, the Internal Revenue Service (IRS) determined that the disclaimer was not valid under the internal revenue code and that the disclaimer effected a taxable gift. The IRS assessed a gift tax and interest for the calendar quarters ending September 1979 and September 1980. Sally Irvine paid the tax and interest under protest and then filed with the IRS for a refund.

The IRS assessed additional taxes as a result of its finding that the Irvine disclaimer was a taxable gift. The IRS reduced Irvine's available unified credit and assessed taxes on gifts to which the credit had been applied. Irvine paid the additional tax and interest and filed for a refund on the grounds that the disclaimer at issue was valid and effective. The IRS disallowed both of Irvine's refund claims on March 26, 1987, and plaintiffs responded by bringing this action.

ANALYSIS

In deciding cross-motions for summary judgment the court must apply the standards set forth in Fed. R.Civ.P. 56(c). Judgment shall be rendered for a moving party provided that the pleadings and materials on file demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. "Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Anderson v. Libberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The judge's function at the summary judgment stage is not to weigh the evidence, but to de-

termine whether there is a genuine issue for trial. *Id.* at 249.

The IRS assessed taxes in this case under the authority of §§ 2501 and 2511 of the internal revenue code. In part, they provide:

> A tax, computed as provided in section 2502, is hereby imposed for each calendar year on the transfer of property by gift during such calendar year by an individual, resident or nonresident.

26 U.S.C. § 2501(a)(1):

> subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible . . . .

26 U.S.C. § 2511(a). The Supreme Court has held that the board language of these provisions "purports to reach any gratuitous transfer of any interest in property." *Dickman v. Commissioner*, 465 U.S. 330, 333 (1984).

On the other hand, courts have long recognized an exception to federal estate and gift taxes for disclaimers. In *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied* 290 U.S. 641 (1933), a husband refused to accept a bequest under his wife's will. He filed an application for distribution with the probate court renouncing his interest in the property. Under Ohio law this was a valid disclaimer. The Collector of Internal Revenue assessed taxes on the property disclaimed, construing the disclaimer as a taxable transfer. The Sixth Circuit rejected the govern-

ment's position, holding that since the husband had never acquired ownership of the property, the disclaimer was not a taxable transfer. Instead, it was deemed an exercise of his right to refuse a gift of property. *Id.* at 916-17; *cited with approval in Jewett v. Commissioner*, 455 U.S. 305, 314-15 (1982).

In the case at hand the IRS does not contest the right of Sally Irvine to disclaim an interest in the trust corpus. However, the IRS contends that the disclaimer in this case is ineffective. The government relies on Treasury Regulation § 25.2511-1(c), which states:

> a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under local law.

26 C.F.R. § 25.2511-1(c).

In *Jewett* the Supreme Court invalidated a disclaimer on the grounds that it failed to comply with the "reasonable time" requirement of § 25.2511-1(c). The petitioner, George Jewett, had executed disclaimers of a contingent interest in a testamentary trust 33 years after the trust was created, but while his interest was still contingent. The trust had been created in 1939 at the death of the grantor, and the disclaimers were executed in 1972.

The facts of *Jewett* distinguish it from the case at hand, but the question addressed by the Supreme Court in *Jewett* is dispositive on the validity of the Irvine disclaimer. The *Jewett* Court identified the issue as follows: "The narrow question presented is whether the 'transfer' referred to in [§ 5.2511-1(c)] occurs when the interest is created, as the Govern-

ment contends, or at a later time when the interest either vests or becomes possessory, as argued by petitioner." *Id.* at 306. The Court concluded that the date of the transfer, for purposes of the gift tax, was the time of the grantor's death. The Court further ruled that applying § 25.2511-1(c), which was promulgated in 1958, retroactively to the 1939 transfer was not unfair. The Court noted that *Jewett's* argument against retroactivity

> is based on the assumption that petitioner had a 'right' to renounce the interest without tax consequences that was taken away by the 1958 Regulation. Petitioner never had such a right. Indeed, petitioner does not argue that taxation of the disclaimers is inconsistent with the statutory provisions imposing a gift tax, *which were enacted long before petitioner's interest in the trust was created.*

Id. at 317 (emphasis added).

The fundamental distinction between *Jewett* and the present case is that the original transfer by Lucius Ordway occurred in 1917, well before the Gift Tax Act was passed in 1932. The IRS would have the court extend *Jewett* and hold that § 25.2511-1(c) applies not only to pre-1958 transfers, but to transfers occurring before passage of the Gift Tax Act as well. Plaintiffs contend that such a construction of the Gift Tax Act and the regulations is unreasonable and was not intended by Congress. In the alternative, plaintiffs argue that application of § 25.2511-1(c) to pre-Act transfers is unconstitutional.

As originally enacted, the 1932 Gift Tax Act clearly states that "[t]he tax shall not apply to a transfer made on or before the date of enactment

of this Act." Gift Tax Act § 501(b) (1932), codified in 26 U.S.C. § 1000 (1932); *see also Commissioner v. Copley's Estate*, 194 F.2d 364, 367 (7th Cir. 1952) ("[T]he gift tax act of 1932 is not applicable to an obligation created prior to its enactment.") Subsequent revisions of the gift tax provisions have maintained the prohibition against taxation of pre-1932 transfers. *See* 26 U.S.C. § 2502 (calculation of gift tax begins with periods after June 6, 1932). Commentators have noted that "Congress has been careful to avoid any taint of retroactivity in connection with the 1932 [gift] tax and the subsequent amendments to the tax." C. Lowndes, R. Kramer & J. McCord, *Federal Estate and Gift Taxes* 643 (1974).

In light of the intent of Congress to avoid retroactive application of gift tax provisions, it would be inconsistent to subject the Irvine disclaimer to the requirements of § 25.2511-1(c). The *Jewett* court had no difficulty with retroactive application of the Regulation to a 1939 transfer, but the court premised its decision on the fact that the interest in question was created long after the Gift Tax Act had become law. *Jewett* does not suggest that disclaimers of pre-Act transfers must comply with § 25.2511-1(c). Moreover, applying the Regulation in this case would frustrate the expectations of the transferor (Lucius Ordway) and the transferee (Sally Irvine). Ordway created the trust at a time when such a gratuitous transfer had no tax consequences. Neither he, nor Sally Irvine, would have contemplated the need for a disclaimer at the time. Only after Congress passed the Gift Tax Act in 1932 did Irvine have a reason to disclaim an interest in the trust proceeds. Under the IRS's interpretation of the § 25.2511-1(c), it was too late for Irvine to execute an effective disclaimer

at this time because the disclaimer would not have been made within a reasonable time after the 1917 transfer. In the absence of statutory authority, legislative history or dispositive precedent the court will not employ such a harsh construction of § 25.2511-1(c).

In *Ordway v. United States*, 3 Fed. Est. & Gift Tax Rep. (CCH) Para. 13,802 (S.D. Fla. 1989), the court reached the same conclusion on virtually identical facts. The plaintiff, John G. Ordway, Jr., is the grandson of Lucius P. Ordway and a cousin to Sally Irvine. He also partially disclaimed an interest in the corpus of the Ordway trust in August of 1979. As with Irvine, the IRS assessed taxes on the disclaimer, finding that the disclaimer failed to comply with § 25.2511-1(c). The court granted summary judgment in favor of the plaintiff in Ordway's refund suit. Significantly, the court found that since the interest disclaimed was created prior to the enactment of the 1932 Act, § 25.2511-1(c) was inapplicable to the transfer.

This case is indistinguishable from *Ordway*, and the court finds the reasoning of *Ordway* compelling. Sally Irvine never accepted the interest that she disclaimed, and her disclaimer is valid under Minnesota law. The IRS contends that Irvine enjoyed "estate planning benefits" because she was aware of her status as a trust beneficiary from 1917 until 1979. This argument is without merit because Irvine's interest in the trust corpus remained contingent until the death of Katharine Ordway, which occurred in 1979.

Since Irvine's disclaimer was effective under Minnesota law, plaintiffs are entitled to the refund they seek in Count I of the complaint. Count II of the

complaint is entirely contingent on the effectiveness of the disclaimer as well. The IRS reduced Irvine's unified gift tax credit solely because it determined that the disclaimer was a taxable transfer. Consequently, the IRS assessed additional taxes. Having found for the plaintiffs on Count I, it follows that summary judgment is appropriate on Count II as well.

Accordingly, IT IS ORDERED that:

1. Plaintiffs' motion for summary judgment shall be, and hereby is, GRANTED.
2. Defendant's motion for summary judgment shall be, and hereby is, DENIED.
3. Within twenty days from the date of this order, plaintiffs shall submit a statement of the amount of refund that they seek, including accrued interest, claims for fees and costs. The defendant shall have ten days within which to respond.

Dated: September 18, 1989.

/s/ Paul A. Magnuson
PAUL A. MAGNUSON
United States District Court Judge

APPENDIX D

STATUTES AND REGULATION INVOLVED

1. 26 U.S.C. 2501(a)(1) provides, in relevant part:

> [A] tax, computed as provided in Section 2502, is hereby imposed on the transfer of property by gift * * * by any individual, resident or non-resident.

2. 26 U.S.C. 2511(a) provides, in relevant part:

> Subject to the limitations contained in this chapter, the tax imposed by Section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *.

3. Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. § 25.2511-1(c) (1958), provides, in relevant part:

> The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reason-

able time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of owner-ship of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property.

4. Section 25.2511-1(c) of the Amended Gift Tax Regulations, 26 C.F.R. § 25.2511-1(c) (1986), provides in relevant part:

(1) The gift tax also applies to gifts indirectly made. Thus, any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax. See further § 25.2512-8 relating to transfers for insufficient consideration. However, in the case of a taxable transfer creating an interest in the person disclaiming made after December 31,

1976, this paragraph (c)(1) shall not apply to the donee if, as a result of a qualified disclaimer by the donee, the property passes to a different donee. Nor shall it apply to a donor if, as a result of a qualified disclaimer by the donee, a completed transfer of an interest in property is not effected. See Section 2518 and the corresponding regulations for rules relating to a qualified disclaimer.

(2) In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocal and effective under the local law. There can be no refusal of ownership of property after its acceptance. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In

any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a completed and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. * * *

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No. 92-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and

FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal gift tax can properly and constitutionally be applied to tax a disclaimer of a remainder interest created in 1917, fifteen years before enactment of the federal gift tax statute in 1932, where the disclaimant's time for disclaimer under the regulation sought to be applied by petitioner ("Regulation") expired *before* enactment of the gift tax, *before* she had any reason to know that a disclaimer timely and effective under local law could be untimely and ineffective under a federal gift tax law not yet enacted.

2. Whether the Regulation can ever properly and constitutionally be applied in measuring the effectiveness for federal gift tax purposes of a disclaimer, timely and effective under local law, of an interest created before enactment of the federal gift tax statute in 1932, even in situations, unlike the present case, in which the disclaimant's time for disclaimer under the Regulation would not have expired before enactment of the gift tax.

3. Whether the Regulation applies at all when measuring the effectiveness for federal gift tax purposes of a disclaimer of an interest created in an *inter vivos*, as opposed to a testamentary, transfer.

4. Whether alternative grounds support the judgment of the *en banc* court of appeals, including that (a) the disclaimer in fact satisfied the Regulation, (b) if the Regulation applies and the disclaimer falls within the scope of the holding of *Jewett v. Commissioner*, 455 U.S. 305 (1982), it is improper and inequitable to apply the 1982 *Jewett* holding retroactively to tax the 1979 disclaimer at issue here, where the disclaimer was made in accordance with the then-governing law in the circuit in which the disclaimant had resided during her entire life, and where

the announced policy of the Internal Revenue Service was that it would follow that law for taxpayers residing in that circuit, and (c) if it is held to apply, *Jewett* should be reconsidered due to failures by both parties to apprise the Court fully of the authorities relevant to its determination of that case.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and

FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for a writ of certiorari seeking review of the *en banc* Eighth Circuit's judgment in this case. The judgment is not in any respect contrary to this Court's decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), does not present a square conflict with the judgment of any other federal circuit, and does not present any recurring or important issue for this Court. In addition, the judgment is supported by at least three alternative grounds.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the portions of Sections 2501(a)(1) and 2511 of the Internal Revenue Code and Section 25.2511–1(c) of the Treasury Regulations set out in the petition, *see* Pet. 2,1/ the following constitutional and statutory provisions are directly involved in the case:

1. The Due Process Clause of the Fifth Amendment to the U.S. Constitution, which provides that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . ."

2. Section 501(b) of the Revenue Act of 1932, 47 Stat. 245, which provides that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]."

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, Respondents draw the Court's attention to certain relevant factual errors and omissions in the petition.

1/ "Pet." refers to the petition for a writ of certiorari, "Pet. App." refers to the appendix to the petition, "8th C. Br." refers to the main brief filed by Petitioner in the court of appeals, "8th C. App." refers to the appendix filed by Petitioner in the court of appeals, "8th C. Supp. App." refers to the supplemental appendix filed by Respondents in the court of appeals, and "D.Ct. Br." refers to the main brief filed by the Petitioner in the district court in support of its motion for partial summary judgment, found at D. Ct. Docket Doc. II-28 (*see* 8th C. App. 3). "Oral Arg." refers to the taped oral argument before the *en banc* court of appeals on January 6, 1992, which is on file with the Clerk of that court. Respondents obtained a copy and have prepared a transcript of the tape.

A. Nature of Action

This is an action for refund of $7,530,706.90 in federal gift tax erroneously assessed against and collected from Sally O. Irvine in 1982, plus statutory interest. 8th C. App. 18. Mrs. Irvine died in 1987, and Respondents John O. Irvine and First Trust National Association[2/] are the co-representatives of her Estate, the successor-in-interest to her refund claims. Pet. App. 2a, 4a.

The action involves the effectiveness for federal gift tax purposes of Mrs. Irvine's written Disclaimer of a portion of her remainder interest in the Ordway Trust ("Trust"). The Trust was created by her grandfather Lucius Ordway ("Lucius") in an *inter vivos* transfer in 1917, Pet. App. 2a, fifteen years before enactment of the federal gift tax statute on June 6, 1932 ("Gift Tax Act" or "Act").[3/]

B. History and Terms of the Trust

Mrs. Irvine was six years old when Lucius created the Trust in 1917. The Government conceded in the lower courts that Mrs. Irvine had learned of her remainder interest in the Trust by the time she reached the age of majority. 8th C. Br. 3; D. Ct. Br. 4-5. The lower courts and the parties assumed that the age of majority

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2/ Pursuant to Supreme Court Rule 29.1, Respondent First Trust National Association states that it is a national banking association organized under the laws of the United States and a wholly-owned subsidiary of First Bank System, Inc., a Delaware corporation. Respondent has no subsidiaries.

3/ Rev. Act of 1932, §§ 501-532, 47 Stat. 245-59.

was twenty–one, which Mrs. Irvine reached in 1931. Pet. App. 3a.4/

The Trust was to continue until the death of the survivor of Lucius's wife and five children. Then, the Trust would terminate and the Trust principal would be distributed in equal shares to Lucius's grandchildren then living and the deceased grandchildren that had died leaving issue. Mrs. Irvine, as Lucius's grandchild, would be entitled to a share of the Trust principal only after expiration of the intervening life interests, only if she were alive at that time, and only if she were to accept the interest. Pet. App. 2a-3a.

C. Mrs. Irvine's Disclaimer

Upon the death of Lucius's last surviving child in June 1979, the Trust terminated. Mrs. Irvine filed her Disclaimer shortly thereafter. Pet. App. 3a. Minnesota law recognizes, as it did throughout the term of the Trust, a beneficiary's right to refuse, by disclaimer, to accept ownership of a remainder interest in trust principal. *See Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (interpreting Minnesota common law and statute), *overruled on other grounds, Jewett v. Commissioner*, 455 U.S. 305 (1982). The Government concedes that Mrs. Irvine's Disclaimer was a valid, timely, and effective refusal to accept ownership of the interest under Minnesota law, the applicable local law. Pet. 3. In the courts below, the Government also conceded that Mrs. Irvine never accepted any part of her remainder interest. *E.g.*, 8th C. Br. 4 (citing to Respondents'

4/ In fact, during the relevant time period, the age of majority for women in Minnesota was eighteen, reached by Mrs. Irvine in 1928. Minn. Stat. Rev. 1866, ch. LIX, § 2; *see Vlasak v. Vlasak*, 204 Minn. 331, 283 N.W. 489 (1939).

complaint); Oral Arg.[5/] The Government's attempts now to suggest otherwise, in repeatedly referring to Mrs. Irvine's receipt of income benefits under the Trust's separate, entirely different provisions creating life interests, *see* Pet. 3, 13, 14, are both improper and incorrect.[6/] As a result of the Disclaimer, Mrs. Irvine was treated under Minnesota law as if she had died before the Trust's termination, and her children became entitled to equal shares of the disclaimed interest in accordance with Lucius's intent set forth in the 1917 Trust instrument. Pet. App. 4a.

D. The Government's Assessment of Tax

Under the Gift Tax Act and its successor provisions in the Internal Revenue Code, a disclaimer effective for federal gift tax purposes is *not* a transfer of property by the disclaimant (which would be taxable as a gift). Rather, because the disclaimant has refused to accept ownership, the property is considered to be transferred directly from the original transferor to the person ultimately taking in accordance with the trust instrument (and thus nontaxable). Petitioner (the "Government") assessed tax against Mrs. Irvine solely on the basis that the Disclaimer was not effective under Treasury Regulation § 25.2511-1(c) ("Regulation"). The Regulation, interpreting the gift tax provisions of the Code enacted in 1932, was first

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5/ Court: Is that covered by the stipulation?
Mr. Paup: We have agreed there was no acceptance as to the remainder interest.
[Michael L. Paup, appearing for the Government.]

6/ The Government's new attempt is also disingenuous. The Government's own regulations recognize that, because the interests are entirely separate, receipt of trust income as a life interest holder has no effect on the ability to disclaim a remainder interest. Treas. Reg. §§ 25.2518-2(d)(1) and (4) (Ex. 1), 25.2518-3(a)(1).

promulgated in 1958 and then amended in 1986 (1986 addition indicated by underscoring):

> (2) In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, [w]here the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be . . . effective under the local law.

Mrs. Irvine resided in Minnesota, in the Eighth Circuit, for her entire life. At the time of her Disclaimer, *Keinath*, an Eighth Circuit decision, was the only appellate court case that had interpreted the 1958 Regulation. *Keinath* involved the disclaimer of a remainder interest in a testamentary trust created in 1944, made shortly after the trust terminated in 1963, in accordance with Minnesota law. *Keinath* was the first case in which the Government publicly took the position that "transfer" as used in the 1958 Regulation meant the initial transfer creating the remainder interest, rather than the termination of the trust. The Court of Appeals for the Eighth Circuit rejected this position, holding that under the 1958 Regulation, as well as under Minnesota law, the "reasonable time" began to run when the trust terminated and, thus, that the 1963 disclaimer was timely. 480 F.2d at 64. The Government's announced policy after *Keinath* was that it would follow *Keinath* with respect to taxpayers residing in the Eighth Circuit. *See, e.g.*, T.A.M

7829008 (CCH) (Apr. 14, 1978).2/ Mrs. Irvine's Disclaimer was clearly timely under the 1958 Regulation as interpreted in *Keinath*, and it was also timely and effective under Minnesota law.

The Government assessed the tax in this case immediately after this Court's decision in *Jewett v. Commissioner*, 455 U.S. 305 (1982), believing that *Jewett* and its interpretation of the 1958 Regulation controlled the gift tax treatment of Mrs. Irvine's Disclaimer. 8th C. Supp. App. 2, 11. *Jewett* involved a disclaimer in 1972 of a remainder interest in a testamentary trust created in 1939. The Court held that the "transfer" referred to in the 1958 Regulation was the 1939 transfer creating the remainder interest, not the event causing the trust to terminate, and that the "reasonable time" for disclaiming therefore began to run with that 1939 transfer, even though under applicable local law the time would not begin to run until termination of the trust. 455 U.S. at 318. *Jewett* thus rejected *Keinath*'s interpretation of the 1958 Regulation.

In 1986, the Government added the "taxable transfers" language to the Regulation, providing that the Regulation applies only to disclaimers of interests created in "taxable transfers" before 1977, requiring disclaimer within a reasonable time after knowledge of that transfer. The Government seeks to apply the 1986 Regulation to Mrs. Irvine's Disclaimer, not the 1958 Regulation. Pet. 16;

2/ A "TAM" (Technical Advice Memorandum) is a written statement issued by the IRS National Office to a district director in connection with the examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. Treas. Reg. § 301.6110-2(f). TAMs, like General Counsel's Memoranda ("GCMs") and letter rulings, are statements of IRS policy. *Taxation with Representation Fund v. Internal Revenue Service*, 646 F.2d 666, 669-71 (D.C. Cir. 1981) (GCMs); *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350, 353 (D.C. Cir. 1974) (TAMs and letter rulings).

Oral Arg;[8/] *see also* I.R.C. § 7805(b). Although Mrs. Irvine's interest was created in 1917, in a *non*taxable transfer, the Government nonetheless contends that transfer was "taxable." And although the Government fails to acknowledge the point in its petition, Mrs. Irvine's time for making an effective disclaimer under the 1986 Regulation expired *before* enactment of the Gift Tax Act on June 6, 1932. The Government *conceded* this critical point in the court below. Oral Arg.[9/]

8/ Court: . . . . What I don't understand is why didn't you argue that you should win under the '58 Regulation which does not contain that phrase?

Mr. Paup: Well, your honor, the regulations were promulgated and were given effect retroactively at the time they were promulgated.

Court: That is, back seven years to the . . .

Mr. Paup: That is the normal way tax regulations interpreting the law are put into effect.

Court: Okay, so you've got to win with the definition of "taxable transfer?"

Mr. Paup: Yes, sir, and I think we can and should win with the definition of "taxable transfer."

9/ Court: When in your view must she have done the disclaiming to have been reasonable?

Mr. Paup: Well, the regulations don't establish a bright line.

Court: But what's the Government's position?

Mr. Paup: Our position is that it had to be within a reasonable time.

Court: As to what, Mr. Paup, as to what?

Mr. Paup: Within a reasonable time after knowledge of the existence of the initial transfer.

Court: And, prior to the passage of the gift tax?

Mr. Paup: Ah, in this case, certainly, since she knew about it, reached her majority in 1931.

Court: So, the government's position is to have been effective it would have had to have been prior to first enactment, initial enactment of the tax.

. . .

Mr. Paup: That's correct, your honor.

Mrs. Irvine paid the tax assessed by the Government under protest, and Respondents commenced this refund action in the United States District Court for the District of Minnesota in 1988.

E. Action by the Lower Courts

Respondents moved for summary judgment in the district court, arguing principally that application of the Regulation to Mrs. Irvine's Disclaimer violated the express language of the 1986 Regulation, Congress's prohibition of retroactive application of the Gift Tax Act, and the Due Process Clause of the Fifth Amendment. The district court granted Respondents' motion, holding that the Regulation did not apply, and that disclaimers of pre-Act interests are effective for federal gift tax purposes as long as they are valid under applicable state property law.

The district court recognized that *Jewett* presented only a "narrow question" of interpretation of the 1958 Regulation, and that the fundamental distinction between *Jewett* and the present case was that Mrs. Irvine's interest was created well before enactment of the Act. Pet. App. 56a. The district court rejected the Government's construction of the 1986 Regulation to apply retroactively to interests created *before* enactment of the Act, because Congress had clearly stated its intent to avoid retroactive application of the gift tax statute. Pet. App. 57a; *see* Act § 501(b). As the district court understood, under the Government's harsh construction, the time for Mrs. Irvine to disclaim under the 1986 Regulation would have expired before the existence of the federal gift tax, before there was any reason to know that a disclaimer timely under state law could be untimely under federal gift tax laws not yet enacted. Pet. App. 57a–58a.

A split panel of the Eighth Circuit reversed. Judge McMillian and Senior Judge Bright, writing separately, concluded that the 1986 Regulation, despite its language

explicitly limiting its application to disclaimers of interests created in "taxable transfers," nevertheless should be construed to apply to disclaimers of interests created in pre-Act, *non*taxable transfers, such as Mrs. Irvine's interest. Pet. App. 38a, 42a. Judge Bowman dissented from the panel decision, concluding that the others' opinions based on the "taxable transfers" language of the 1986 Regulation were "startling" and contrary to "logic, history, the expressed intent of Congress, and a straightforward reading of the regulations." Pet. App. 47a, 48a (footnote omitted).

The court of appeals granted Respondents' petition for rehearing *en banc*, vacating the panel decision, and then affirmed the district court. The *en banc* court recognized that the Government had assessed the tax solely on the basis of the Regulation. The express language of the 1986 Regulation limited its application to interests created in pre-1977 "taxable transfers," and this was dispositive to the court: the 1986 Regulation, by its terms, did not cover Mrs. Irvine's Disclaimer of an interest created before enactment of the gift tax. As the court of appeals said:

> It is fundamental that for a transfer to be taxable there must be an applicable tax in existence when the transfer is made.

Pet. App. 7a. This is particularly so, the court recognized, in the context of the federal gift tax, because Congress expressly stated that the Gift Tax Act must not be retroactively applied to transfers made before June 6, 1932. Pet. App. 7a; *see* Act § 501(b). Congress continued its prohibition on retroactive application throughout

multiple, subsequent revisions to the Act. Pet. App. 7a.[10/] The court reasoned further that it would be anomalous, and contrary to Congress's clear intent against retroactive application, to apply the 1986 Regulation's separate federal timeliness standard to tax a donee's refusal to accept a gift that never was subject to tax in the first place. Pet. App. 5a–6a. Given the express language of the 1986 Regulation, Congress's express intent, and the constitutional history, the court declined to accept the "startling conclusion" of the split panel decision in *Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991), that "taxable transfers" included a pre-Act, nontaxable transfer. Pet. App. 8a. In *Ordway*, solely on the basis of the "taxable transfers" language, two members of the Eleventh Circuit panel had held a disclaimer by Mrs. Irvine's brother John Ordway to be taxable.[11/]

The *en banc Irvine* court concluded that "[o]nce the pretense that by some mysterious alchemy the treasury regulations have transformed the 1917 transfer into a taxable event is stripped away, the government is left

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10/ The court also recognized that Section 501(b)'s prohibition has constitutional underpinnings. Pet. App. 10a n.4; *see Untermyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927) (first federal gift tax enacted on June 2, 1924, held unconstitutional as applied to gifts made before that date).

11/ The *en banc Irvine* court noted that the *Ordway* majority had premised its interpretation on a single sentence in a *different* regulation interpreting a *different* code section (Treas. Reg. § 25.2518-2(c)(3)), plainly inapplicable to the situation before it. That regulation provides that "a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." The *Irvine* court recognized not only that the second regulation did not apply, but that it simply did not support the *Ordway* majority's conclusion, because there could be no "completed gift for Federal gift tax purposes" since no gift tax was in force when the gift was made. Pet. App. 8a–9a.

without any basis to sustain its position." Pet. App. 10a. The court agreed with Respondents that absent the 1986 Regulation's application, controlling precedents of this Court and the Eighth Circuit hold that state law governed the validity of Mrs. Irvine's Disclaimer for federal gift tax purposes. Pet. App. 10a–11a, *citing Jewett*, 455 U.S. at 315 (under cases antedating the 1958 Regulation, "state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation"), and *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.) (in a case decided before adoption of the 1958 Regulation, court applied state law to determine validity for federal gift tax purposes of disclaimer of intestate shares), *cert. denied*, 344 U.S. 836 (1952). Because it concluded that the 1986 Regulation was plainly inapplicable, the court did not need to reach Respondents' statutory and constitutional arguments.

Judge Loken, who joined in the court's opinion regarding the 1986 Regulation, filed a concurring opinion stating that the 1958 Regulation did not apply either, because that regulation plainly applied only to interests created in testamentary, and not *inter vivos*, transfers. Pet. App. 13a. He reasoned that limiting the 1958 Regulation to its plain language is consistent with interests of fairness and predictability in the tax laws, given that the 1958 Regulation and its federal timeliness requirement were inconsistent with prior judicial interpretations of the gift tax statute. Pet. App. 16a.

Judge McMillian filed a dissenting opinion, adhering to his earlier interpretation of the 1986 Regulation, Pet. App. 17a, and also rejecting one of Respondents' alternative arguments, that the 1982 *Jewett* holding should not be applied retroactively to Mrs. Irvine's 1979 Disclaimer, which was made in accordance with the then-governing law of the Eighth Circuit. Pet. App. 27a–28a.

F. **There is No Flood of Cases Involving Disclaimers of Pre-Gift Tax Act Interests.**

Despite the Government's hyperbole suggesting a flood of cases involving the issue presented here, *see* Pet. 11, 20-21, it has provided no factual support for its statements. Respondents are aware of no other court case, past or pending, presenting the question of the effectiveness for federal transfer tax purposes of a disclaimer of a pre-Act interest by someone like Mrs. Irvine, whose time for disclaimer under the Regulation would have expired *before* enactment of the Act. Only in cases involving such disclaimants does the Government's application of the Regulation retroactively deprive the disclaimant of all opportunity to make an effective disclaimer.

The only two cases the Government has cited, past or pending, that present any question of the effectiveness of a disclaimer of a pre-Act interest both involve disclaimers in the same family Trust involved here made by relatives of Mrs. Irvine who reside in Florida, in the Eleventh Circuit. One case is *Ordway*, the case discussed above involving a disclaimer by Mrs. Irvine's brother John Ordway.[12/] The other, *Johnson v. United States*, No. 89-8192 (S.D. Fla. filed Apr. 27, 1989), involves a disclaimer by Mrs. Irvine's cousin Mary Johnson.[13/] The

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12/ This Court denied Ordway's petition for a writ of certiorari, 111 S. Ct. 2916 (1991), and his subsequent petition for rehearing and motion to defer consideration pending the *en banc* court of appeals decision in the present case. 112 S. Ct. 30 (1991).

13/ The Government misleadingly implies that there are two different *Johnson* cases involving disclaimers of interests in the Trust. *See* Pet. 20. In fact, there is only one case. Johnson had recently moved to Florida when she filed her refund action there. Johnson filed the Minnesota case only as an alternative action, in the event it is determined in the Florida action, contrary to Johnson's position,

district court has not yet addressed the issue of the effectiveness of Johnson's disclaimer.

Both relatives, unlike Mrs. Irvine, reached the age of majority long after enactment of the Act. Ordway, born in 1922, learned of his interest in 1941 and reached the age of majority in 1943. *Ordway*, 908 F.2d at 891-92. Johnson, born even later, in 1929, did not reach the age of majority until 1950. 8th C. Supp. App. 16. In contrast to Mrs. Irvine, Ordway's and Johnson's time for disclaimer under the Regulation did not begin to run until *well after* enactment of the Act.

Respondents know of only one other court case, past or pending, that presents any question of the effectiveness of a disclaimer of a pre-Act interest. The case, *Perkins v. United States*, No. 93-1094OT (D. Mass.), was filed on April 29, 1993. According to the taxpayer's complaint, the case involves a disclaimer in 1977 of a remainder interest in a testamentary trust created in 1926. Taxpayer seeks a refund of only $116,063.43 in tax and interest paid in 1986. Respondents' counsel have been informed by taxpayer's counsel that the disclaiming taxpayer, Frances Perkins, reached the age of majority after enactment of the Act. Her time for disclaimer, like Ordway's and Johnson's, also did not begin to run until after the Act.[14/]

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that Johnson is a resident of Minnesota rather than Florida. Complaint ¶ 1, filed in *Johnson v. United States*, No. 3-89-265 (D. Minn. filed Apr. 28, 1989).

14/ Respondents' counsel also have been informed that the taxpayer in *Perkins* has recently died. The trust instrument is not attached to the complaint, and Respondents know nothing else about the facts of the case. There may be additional fundamental distinctions between this case and *Perkins*, such as acceptance, lack of knowledge of the trust until after enactment of the Act, or other powers under the trust existing past June 6, 1932, and extending the right to disclaim.

REASONS FOR DENYING THE WRIT

A. The *En Banc* Court of Appeals Decision in *Irvine* is Not in Conflict with this Court's Decision in *Jewett*.

The Government contends that certiorari should be granted because the result below contradicts this Court's decision in *Jewett*. According to the Government, *Jewett* held that Congress intended that *any* disclaimer of a remainder interest in a trust is a "transfer of property by gift" to which the gift tax applies. Pet. 11. As both courts below recognized, the Government has flatly mischaracterized the *Jewett* holding to make this contention.[15/] The result in this case does not conflict with *Jewett*, because it involves a different Treasury Regulation and different facts.

15/ The Government recognized in its brief filed in *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989), that the ability effectively to refuse a gift is *implicit* in Section 2511 of the Code. 8th C. Supp. App. 6, 52. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), established this principle in 1933. In a recent official policy statement, the Government reiterated that effective disclaimers are not "transfers":

> Because the disclaimant is regarded as never having accepted or received the disclaimed property, the disclaimer is not considered to involve a transfer of property by the disclaimant.... This "no transfer" analysis is reflected in a very early tax case which held that a disclaimer of a legacy was a refusal to accept the property, rather than a transfer of property by the disclaimant in contemplation of death. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933).

G.C.M. 39858, 1991 I.R.S. G.C.M. LEXIS 34 (Sept. 9, 1991).

As Justice Stevens wrote for the majority, *Jewett* involved only a "narrow question" of interpretation of the 1958 Regulation:

> The narrow question presented is whether the "transfer" referred to in the Regulation occurs when the interest is created [in 1939], as the Government contends, or at a later time when the interest either vests or becomes possessory, as argued by petitioner.

Id. at 306. The 1958 Regulation interpreted in *Jewett* does not apply to Mrs. Irvine's Disclaimer. The *1986 Regulation* is at issue here, and it applies only to disclaimers of interests created in pre-1977 "taxable transfers."

Moreover, this case presents statutory and constitutional issues that were not before the Court in *Jewett*. Unlike Jewett, whose interest was not created until 1939, Mrs. Irvine's time for making an effective disclaimer expired *before* enactment of the Gift Tax Act under the Regulation as applied by the Government. As Respondents argued in the courts below, this retroactive application of the Regulation to Mrs. Irvine, precluding her, without notice, from ever making an effective disclaimer, violated both the Act and the Due Process Clause.[16/] Respondents' statutory argument was based primarily on Section 501(b) of the Act, which provides that "[t]he tax shall not apply to a transfer made on or

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16/ The Government has acknowledged that "the 1917 transfer . . . establishes the date from which the taxpayer is given a 'reasonable time' to disclaim an interest in property under the regulation . . . ," 8th C. Br. 25, and that Mrs. Irvine's time for disclaimer under the 1986 Regulation expired *before* enactment of the Act. *See, e.g.*, n.9, *supra*. In the district court, the Government conceded that its application of the Regulation was retroactive. D. Ct. Br. 17-18.

before the date of the enactment of this Act [June 6, 1932]," and Congress's adherence to Section 501(b)'s prohibition in its multiple subsequent amendments to the Act "avoid[ing] any taint of retroactivity in connection with the [gift tax]. . . ." C. Lowndes, R. Kramer & J. McCord, *Federal Estate and Gift Taxes* 643 (1974).17/ Respondents' constitutional argument was based on a long line of this Court's precedents, which establish that in testing the constitutionality of a retroactive tax statute,

> [The court] must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." ... One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute.

United States v. Hemme, 476 U.S. 558, 568-69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)).18/ Respondents argued below that application of the 1986 Regulation to tax Mrs. Irvine's Disclaimer, without notice, gave a different and more oppressive legal effect to her failure to disclaim before enactment of the Act. *See Hemme*, 476 U.S. at 569; *see also Heiner v. Donnan*, 285

17/ Congress has made every new gift tax disclaimer rule applicable only to interests created on or after enactment of the new rule. *See, e.g.*, Pub. L. No. 94-455, §§ 2009(b)(1), 2009(e)(2), 90 Stat. 1893, 1896 (1976).

18/ *See also Helvering v. Helmholz*, 296 U.S. 93 (1935); *Heiner v. Donnan*, 285 U.S. 312 (1932); *Untermyer*, 276 U.S. 440; *Blodgett*, 275 U.S. 142 (all holding federal transfer tax statutes unconstitutional under Due Process Clause).

U.S. 312 (1932) (statute held unconstitutional as a gift tax where narrow class of taxpayers subjected to much harsher treatment than remaining taxpayers for no legitimate purpose). Respondents also argued that imposition of the tax violated Lucius Ordway's constitutional rights.[19/]

Jewett did not present these statutory and constitutional issues because Jewett's interest was created in 1939, after the Act was enacted. Indeed, the fact that Jewett's interest was created after enactment of the Act was critical to the Court in resolving the narrow question before it. *See* 455 U.S. at 317. The Court emphasized this fact in response to Jewett's equitable argument based on Section 7805(b) of the Code, which affords the Government liberal discretion to apply regulations retroactively, but only to the *date of enactment* of the applicable Code provision. Jewett had argued that retroactive application of the Regulation to an interest created in 1939 was nevertheless an abuse of this discretion, because by the time the Regulation was adopted in 1958, it was already too late for him to disclaim. The Court rejected Jewett's equitable argument under Section 7805(b)'s deferential standard, but it did so because the Regulation interpreted a statute enacted *long before* his time for disclaimer began to run. It is, however, unprecedented and, indeed, forbidden under Section 7805(b) itself, for a regulation to have an effective date that *pre-dates* the effective date of the statute being interpreted, here imposing a time period for disclaimer that expired before enactment of the Act. *See also* Act § 501(b) (no retroactive application).

19/ Respondents quite rightfully asserted violations of Lucius's rights as well as Mrs. Irvine's. *See Hodel v. Irving*, 481 U.S. 704, 711-12 (1987) (rights of decedent to pass his property at death without violation of Fifth Amendment may be asserted by decedent's heirs and devisees without violation of prudential standing limitations).

The fact that Jewett's interest was created well after the Act also was critical to the Court's conclusion that Jewett had no "right" to make a disclaimer without gift tax consequences. 455 U.S. at 317. The Government's own brief before the Court in *Jewett* had advanced this position:

> [P]etitioner never had a right to disclaim his remainder interest free of gift tax. That tax is imposed by provisions of the Code enacted in 1932--seven years before [the trust was established creating his interest]. . . . Thus, the Regulation did not deprive petitioner of any pre–existing right.

8th C. Supp. App. 53-54. Unlike Jewett, Mrs. Irvine did have a pre-existing right, which was preserved by Section 501(b) of the Act and the Due Process Clause.

Thus, because the 1986 Regulation at issue here was not at issue in *Jewett*, and because this case presented statutory and constitutional issues not before the Court in *Jewett*, the judgment of the *en banc* court of appeals does not conflict with *Jewett*.

B. There is No Square Conflict Between *Irvine* and *Ordway* Due to the Dispositive, Constitutionally Significant Factual Differences Between the Two Cases.

Although the *en banc* Eighth Circuit opinion in the present case and the split panel opinion of the Eleventh Circuit in *Ordway* appear to be in conflict over the meaning of the 1986 Regulation, this Court reviews judgments and not opinions. There is an overarching factual difference between the two cases, so significant that *Irvine* and *Ordway* raise completely different retroactivity

problems. Thus, the *Irvine* and *Ordway* judgments do not present a square conflict for this Court to resolve.

Mrs. Irvine's time for making an effective disclaimer under the Regulation sought to be applied by the Government expired *before* enactment of the Gift Tax Act. Ordway, much younger than his sister, did not learn of his interest until 1941 and did not reach the age of majority until 1943. Under the Regulation, Ordway's time for disclaimer did not begin to run until *well after* enactment of the gift tax.

Because of this factual difference, Respondents' statutory and constitutional arguments in the courts below were different, and much more compelling, than Ordway's arguments. Because Ordway himself was not taxed on the basis of his failure to act before enactment of the Act, he could only argue that application of the Regulation to *any* pre-Act interests violated the consistent effective date history for new gift tax rules and violated *Lucius's* constitutional rights. Respondents' case is fundamentally different, because application of the Regulation to Mrs. Irvine retroactively and without notice deprived *her* of all opportunity to make an effective disclaimer.[20/]

Respondents recognize that the *en banc* Eighth Circuit in the present case and the split panel of the Eleventh Circuit in *Ordway* differed in their interpretation of the "taxable transfers" language of the 1986 Regulation. To the extent that the differing

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20/ The statutory and constitutional issues, while briefed and argued in the lower courts, were not directly passed upon by either the *en banc* Eighth Circuit or the Eleventh Circuit. They would, however, be squarely presented here if this Court were to reject the Eighth Circuit's interpretation of the 1986 Regulation. Because this Court would necessarily then need to reach these significant statutory and constitutional issues without any guidance from the circuit courts, this case is a poor vehicle for this Court to use to resolve a two-circuit disagreement over the meaning of a little-used Regulation.

interpretations present a problem for the Government, it is only a superficial one which the Government easily can resolve, at least as applied to future cases, by amending the 1986 Regulation. *See Chevron U.S.A., Inc. v. Sheffield*, 471 U.S. 1140 (1985) (opinion of Stevens, J., respecting denial of certiorari) (noting that "review in this Court is not necessary" in part because "the Coast Guard retains the power to modify its regulations" interpreted by the lower court). In fact, the Government, recognizing its own power to resolve differing interpretations of its regulations without this Court's intervention, informed the district court in this case in mid-1989 that it *did* intend to change the "taxable transfers" language:

> It's poor draftsmanship, there is no doubt about that, and the [Internal Revenue] Service has informed me they will be issuing in the next 90 days or so clarification on this point.21/

For some reason, despite its representation to the court, the Government never made the change and ultimately terminated the amendment project.22/

21/ 8th Cir. App. 40 (transcript of oral argument on cross motions for summary judgment on July 14, 1989; Thomas D. Sykes appearing for the Government).

22/ *See* IRS Notice 92-12, 1992-1 C.B. 500, 501 (IRS intends to terminate project as of June 30, 1992, without issuing regulations). The Government's contention that the court of appeals decision "threatens significant uncertainty" about the 1986 Regulation's application to interests created in certain *post*-Act transfers, Pet. 20 n.8, is without merit. The holding and analysis of the *en banc* court of appeals were strictly limited to interests created in nontaxable, *pre*-Act transfers. And in any case, particularly as to issues not involving *pre*-Act transfers, the Government can correct any perceived defects in its 1986 Regulation simply by amending it.

C. This Case Does Not Present a Recurring Issue of Substantial Importance.

1. This is the Only Case Involving a Disclaimant Whose Right to Disclaim Would Have Expired Before Enactment of the Act.

The Government distorts the facts in arguing the importance of this case, hypothesizing that *Irvine* might spawn litigation by "thousands" of taxpayers involving "billions of dollars" of trust assets and "enormous amounts" of gift tax revenues. Pet. 11, 21. These wild speculations are no substitute for the facts: Mrs. Irvine's case is the only case known to Respondents, and the Government has cited no others, involving a disclaimer of a pre-Act interest by a disclaimant whose right to disclaim would have expired before enactment of the Act under the Government's application of the 1986 Regulation. Only in cases like Mrs. Irvine's does application of the 1986 Regulation deprive the beneficiary of all opportunity to make an effective disclaimer. Mrs. Irvine's case is thus unique. This Court customarily does not exercise its power of discretionary review in cases bound by unique facts. *See Chevron U.S.A.*, 471 U.S. at 1140 (opinion of Stevens, J.), (among reasons supporting denial of certiorari, "apparently only one 26-year-old vessel" may be affected by lower court's ruling).[23/]

[23/] The Government also exaggerates the true amount at issue in referring to tax and interest exceeding $30,500,000. *See* Pet. 20. This case involves just over $7,500,000 in disputed tax. The amount of accrued interest is of no special significance, because it simply represents the time value of money available to any prevailing party in a tax controversy, whether the taxpayer or the Government. I.R.C. §§ 6601, 6611; 28 U.S.C. § 2411. Also, interest recovered by taxpayers is itself subject to federal income tax. I.R.C. § 61(a)(4).

The only other cases, past or pending, involving issues of the effectiveness of a disclaimer of a pre-Act interest are the two cases arising in the Eleventh Circuit involving disclaimers by Mrs. Irvine's relatives and the *Perkins* case recently filed in a First Circuit district court. These cases do *not* involve disclaimants whose rights to disclaim would have expired before the Act and, thus, the cases are fundamentally different from this case.[24/]

2. The Government's Bald Assertions About Large Numbers of Potential Cases Are Belied By the Total Absence of Any Other Cases Since 1958.

The Government posits that the *Irvine* decision "affects" the transfer tax liability of "a large number of individuals" who are beneficiaries of "thousands of trusts" created before 1932 with "billions of dollars" of trust assets. Pet. 20, 21. These assertions are entirely unsubstantiated, in stark contrast with the Government's usual practice of presenting detailed information about pending cases to justify review by this Court. *E.g.*, Mem. for Respondent at 9, filed in *Dickman v. Commissioner*, No. 82-1041 (supporting certiorari in part because "there may be as many as 31 pending cases" presenting same gift tax issue); Mem. for Respondent at 6, filed in *Diedrich v. Commissioner*, No. 80-2204 (supporting certiorari in part because "at least 22 other cases" presented same income

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24/ In the court of appeals, the Government had cited *Fuller v. Commissioner*, 37 T.C. 147 (1961), involving a disclaimer in 1956 of an interest created in 1931, but the issue whether the Regulation could apply to a pre-Act interest was not even raised in that case. The Tax Court found the disclaimer to be taxable because the taxpayer for almost twenty-five years had received the benefits of the interest purportedly disclaimed. This receipt amounted to acceptance, which always precludes an effective disclaimer. 37 T.C. at 155.

tax issue). The Government's unsubstantiated assertions here do not justify the Court's exercise of jurisdiction.

Disclaimers have been the subject of tax litigation at least since the early 1930s. If large numbers of cases like Mrs. Irvine's are likely *after Irvine*, as the Government contends, it seems clear that such cases, at least *one* other case, would have arisen in the thirty-five years since promulgation of the 1958 Regulation. In fact, in 1958, the number of potential cases of this type was at its highest. The number can only have diminished steadily since then, and the possibility of similar cases arising *now* is slimmer than ever. Only those persons now old enough to have learned of their interest *and* reached the age of majority before enactment of the Act *and* who are remainder beneficiaries of pre-Act trusts not yet terminated *and* who are still alive when the trust terminates might even consider disclaiming their remainder interests. Whether a disclaimer would be made would depend on not only the federal transfer tax consequences, but also a host of other factors. As each year passes and pre-Act trusts terminate and beneficiaries whose rights under the Regulation would have expired before enactment of the Act age and die, this small class of persons who might make a disclaimer will shrink further, until it is nonexistent.

D. In Any Event, Issues Relating to the Gift Tax Treatment of Disclaimers of Pre-Act Interests Should Be Left to Percolate Further in the Lower Federal Courts.

Review by the Court at this time would be at best premature. First, the Court may never have to consider the issue presented here at all, because other potential cases by the small class of potential disclaimants discussed above may never be filed. Second, the Court may never have to consider *any* issues of the effectiveness of a

disclaimer of a pre–Act interest, even issues involving disclaimants whose right to disclaim would not have expired before the Act. The Eleventh Circuit already has decided *Ordway*, and this Court already has declined review there. In *Johnson*, the Eleventh Circuit may have an opportunity to reconsider its split panel decision in *Ordway* in light of the *en banc Irvine* decision, and may decide *Johnson* in favor of the taxpayer. Similarly, the recently-filed *Perkins* case may present an opportunity for another court of appeals, the First Circuit, to consider an issue of the effectiveness of a disclaimer of a pre-Act interest, and the First Circuit also may decide in favor of the taxpayer. Third, if *Johnson* or *Perkins* eventually comes before this Court, the Court then would have another opportunity to consider whether to exercise its discretionary jurisdiction and would have the benefit of an Eleventh Circuit decision rendered in light of *Irvine*, a decision of the First Circuit, or both. Fourth, both Johnson's and Perkins' cases would be free of the unique retroactivity problems of this case, because their right to disclaim would not have expired before the Act. Finally, by then, if others of the putative "thousands" of beneficiaries of the trusts holding "billions" of dollars of assets have chosen to make disclaimers, as the Government here only speculates, the Government may then have a stronger basis to contend that review by this Court is appropriate.

E. Alternative Grounds Support the Judgment Below.

Finally, the judgment of the *en banc* court of appeals is supported by at least three alternative grounds, briefed and argued in the court below, that that court did not need to reach.[25/]

First, regardless of whether the Regulation can be properly and constitutionally applied to Mrs. Irvine's Disclaimer, the Disclaimer was timely and effective within the meaning of the Regulation because the number of remainder beneficiaries of the Trust was not fixed until the Trust terminated. This Court found it significant in deciding *Jewett* that the only contingency preventing Jewett from taking his share of trust principal was the requirement that he survive the life beneficiaries. *See* 455 U.S. at 318. Subsequent cases have recognized that *Jewett* is limited to these facts. For example, all three courts of appeals applying the Regulation to disclaimers by a surviving joint tenant of the deceased joint tenant's interest rejected the Government's contention that *Jewett* required disclaimer within a reasonable time of the transfer creating the joint tenancy. All three courts held that because an important contingency in addition to survival would prevent the surviving joint tenant from succeeding to the deceased joint tenant's interest, the relevant "transfer" for purposes of the Regulation did not occur until the death of the joint tenant, and disclaimer within a reasonable time after that death was timely.[26/]

25/ These alternative grounds also distinguish this case from the Eleventh Circuit's decision in *Ordway*, because none of them was briefed or argued by Ordway before that decision.

26/ *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989) (lower court opinion at 89 T.C. 293, 295 n.7 indicates interest held more than thirty-four years before disclaimer); *Estate of Dancy v. Commissioner*, 872 F.2d 84 (4th

Important contingencies, in addition to the survival contingency, were also present for Mrs. Irvine. The number of remainder beneficiaries of the Trust, and the size of Mrs. Irvine's remainder interest, was subject to change throughout the Trust term and, in fact, did change considerably. Under these circumstances, the relevant "transfer" for purposes of the Regulation is not the transfer creating the interest but the termination of the trust, the event that caused the contingencies to disappear.

Second, if the Regulation applies and if Mrs. Irvine's Disclaimer falls within the scope of the *Jewett* holding, it is improper and inequitable, under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971),[27/] to apply the 1982 *Jewett* holding retroactively to tax Mrs. Irvine's 1979 Disclaimer. As discussed above, Mrs. Irvine resided in the Eighth Circuit her entire life, and at the time of her

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Cir. 1989); *Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir. 1986) (interest held more than twenty-five years before disclaimer). In all three cases, applicable local law permitted the deceased joint tenant, while alive, to sever the joint tenancy through sale of his or her interest, stripping the surviving joint tenant of any survivorship interest. The Government gave up litigating joint tenancy disclaimer cases in 1990. 8th C. Supp. App. 39-40 (IRS Action on Decision CC-1990-06 (Feb. 7, 1990)).

27/ *Chevron* remains persuasive authority even after *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), a case in which the Court considered the permissible scope of "selective nonretroactivity" of a decision involving an unconstitutional state tax. Unlike *Beam*, *Chevron* did not involve a new constitutional rule, and furnishes the appropriate test for analyzing the nonretroactivity issue in this case. As applied here, *Jewett* announced a new rule of law in the government's *favor*, not mandated by the Constitution, which overruled the *Keinath* holding on which Mrs. Irvine had justifiably relied in making her Disclaimer. Jewett resided in the Ninth Circuit and in any case could not have relied on *Keinath*, because he disclaimed before *Keinath* was decided, so *Jewett* cannot be said to have implicitly decided the nonretroactivity question presented here.

Disclaimer *Keinath* was the governing law, acknowledged as such by the Government. Under *Chevron*'s three-part test, application of *Jewett* to Mrs. Irvine's Disclaimer would be unfairly harsh, because *Jewett* overruled the *Keinath* decision on which Mrs. Irvine justifiably relied to her substantial detriment.

Finally, if the Regulation applies and if Mrs. Irvine's Disclaimer falls within the scope of the *Jewett* holding applied retroactively, Respondents respectfully submit that *Jewett* should be reconsidered, due to failures by both parties in that case to apprise the Court fully of the information and authorities relevant to the Court's holding. The Court's interpretation of "transfer" as used in the 1958 Regulation was premised on its view that the Commissioner had consistently interpreted the Regulation, *see* 455 U.S. at 318, when in fact he had not. *See* 8th C. Supp. App. 62-64 (letter ruling P.L.R. 6612201590A (Dec. 20, 1966)).[28/] The Court's interpretation also was based on an incomplete record of, among other things, the Government's position regarding disclaimers *before* issuance of the 1958 Regulation. Respondents obtained a number of documents in this case, in discovery and in the IRS FOIA Reading Room, that were not before the Court in *Jewett*. Two IRS policy statements in particular demonstrate that before the 1958 Regulation, the Government's position was that disclaimers would be effective for federal gift tax purposes as long as they

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28/ This ruling allowed a taxpayer with knowledge since 1936 of an income interest in a trust created in 1933 to disclaim free of gift tax in 1966 when she became entitled to additional income as a result of the death of one of the other income beneficiaries. The relevant "transfer" as the Service applied the Regulation in that ruling was the event entitling the taxpayer to more income than earlier, *not* the transfer creating her interest in 1933. The Commissioner's counsel thus misinformed the Court in oral argument in *Jewett* in stating that the Commissioner had "[a]bsolutely not" changed his mind on the meaning of the Regulation. 8th C. Supp. App. 6, 58–61.

satisfied state law. 8th C. Supp. App. 4-5, 31-38 (G.C.M. 27626 (Jan. 13, 1953); unnumbered G.C.M. (May 3, 1956)).[29] The parties also failed fully to inform the Court of the extensive authorities demonstrating that any separate federal timeliness standard in the 1958 Regulation was a new standard and, as such, should be applied only to interests created after its promulgation. *E.g.*, 8th C. Supp. App. 7, 65-68 (early draft of 1958 Regulation which district court ordered Government to produce in discovery containing detailed examples of "transfers" intended to be subject to gift tax but not mentioning disclaimers).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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[29] G.C.M. 27626 states that "[t]he estate and gift tax provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation," citing *Brown v. Routzahn*. The unnumbered G.C.M. discusses a proposed change of the Government's position on the gift tax treatment of disclaimers and indicates that the treatment at that time depended on local law.

Dated: May 25, 1993

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No. 92-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and

FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONSE TO MOTIONS TO FILE BRIEFS *AMICUS CURIAE* BY JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY AND THE AMERICAN BANKERS ASSOCIATION

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Respondents John O. Irvine and First Trust National Association, as co-representatives of the Estate of Sally Ordway Irvine, the deceased taxpayer, submit this response to the Motions by John G. Ordway, Jr. and Margaret M. Ordway and the American Bankers Association for leave to file briefs *amicus curiae*. Respondents refused consent and oppose the motions because the putative *amici* raise nothing that has not already been brought to the attention of the Court.

Accordingly, the motions are "not favored" and should be denied. Sup. Ct. R. 37.1-.2.

John G. Ordway, Jr. and Margaret M. Ordway ("Ordway"), the brother and sister-in-law of the deceased taxpayer here, have already unsuccessfully petitioned for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit. *See Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). The Court also denied Ordway's request that the Court defer consideration of his petition for rehearing pending a decision of the Court of Appeals for the Eighth Circuit *en banc*. 112 S. Ct. 30 (1992). This Court, therefore, has already had the benefit of Ordway's petition.

Ordway's brief *amicus curiae* adds nothing which has not already been presented by Petitioner or Respondents. Ordway asserts without analysis a factual identity between his case and the present case and a square circuit conflict. The facts in *Ordway* are not, however, identical to the facts in this case. Indeed, they are dispositively different. Mrs. Irvine had learned of her interest in the Ordway Trust by the time she reached the age of majority, before enactment of the Gift Tax Act in 1932. Under the Treasury Regulation sought to be applied by the Government to tax Mrs. Irvine's Disclaimer of her interest, the Government's position is that Mrs. Irvine's time for making an effective disclaimer for federal gift tax purposes expired *before* enactment of the gift tax. John Ordway, much younger than his sister Mrs. Irvine, did not learn of his interest until 1941 and did not reach the age of majority until 1943. Thus, under the Regulation, Ordway's time for disclaimer did not begin to run until *well after* enactment of the gift tax. Respondents' statutory and constitutional arguments in the courts below were thus both different and more compelling than Ordway's arguments. Moreover, due to these factual differences, there is not a square conflict between the judgment in *Ordway* and that of the *en banc* Eighth

Circuit in this case, as Respondents establish in greater detail in their Brief in Opposition.

The American Bankers Association ("ABA") also brings nothing new to the Court's attention. The ABA simply repeats the Petitioner's unsubstantiated factual assertions concerning the supposed magnitude of the gift tax consequences of the Eighth Circuit's decision. Indeed, it does so to a fault, citing no other case, either past or pending, which presents the unique disclaimer situation of Mrs. Irvine's case. In the main, the ABA simply parrots the Petitioner's arguments regarding the need for certainty in matters of taxation, asserting that under the present state of the law member banks may be subject to surcharge for giving erroneous tax advice concerning disclaimers. What they do not tell the Court is that trust departments carefully avoid giving any tax advice to trust beneficiaries. *Cf. In re Otterness*, 181 Minn. 254, 257, 232 N.W. 318, 319 (1930) (bank lawyer may not give legal advice to customer). Thus, the supposed threat of surcharge actions against bank trust departments for erroneous gift tax advice is contrived.

Respondents refused consent to Ordway and the ABA, and resist the present motions, because they bring no relevant matters to the attention of the Court which have not already been brought to its attention by the parties. Accordingly, Respondents respectfully request that the motions for leave to file briefs *amicus curiae* be denied.

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UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondents err in asserting (Br. in Opp. 22-24) that this case does not present a recurring issue of substantial importance to the administration of the tax laws. As the petition points out (Pet. 20-21), thousands of trusts created prior to enactment of the gift tax in 1932 remain in existence. The beneficiaries of those trusts control the disposition of billions of dollars of trust assets. The American Bankers Association confirms (ABA Amicus Br. 2) that "[i]n ABA's member banks there are considerable numbers of pre-1932 trusts under corporate fiduciary management which hold billions of dollars in assets." Relying upon the opinion of the court of appeals, a large number of individuals who have contingent

remainder interests in such trusts may now seek to disclaim those interests on a tax-free basis, even though they may have known of the existence of the interests and controlled their disposition for many years.

It is, of course, difficult to estimate with precision the magnitude of the impact of the decision of the court of appeals. It is evident, however, that the decision in this case creates significant new opportunities for gift and estate tax avoidance by members of the wealthiest class of taxpayers.[1] Because of the conflict that now exists among the circuits on the tax treatment of such disclaimers, these taxpayers will be unable to pursue their important gift and estate planning decisions with certainty. See ABA Amicus Br. 3 ("Such confusion in the law is disruptive" to the formation of irrevocable estate planning decisions.). Resolution by this Court of this important, recurring issue is needed to avoid continuing uncertainty and inconsistent application of the revenue laws.

2. The holding of the court of appeals in this case—that a disclaimer of an interest in a pre-1932 trust is not subject to the gift tax—contradicts the conclusion of this Court in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), that the gift tax "unquestionably encompasses an indirect transfer, effected by means

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[1] Gift tax returns and claims for refund based upon the decision in this case have already been submitted by taxpayers seeking to take advantage of its holding. For example, the refund claim in *Perkins* v. *United States*, No. 93-10940T (D. Mass. filed Apr. 29, 1993), which involves the disclaimer of a remainder interest in a testamentary trust created in 1926, was brought less than four months after the filing of the *en banc* decision in this case.

of a disclaimer, of a contingent future interest in a trust" (*id.* at 310). In contending that "[t]he result in this case does not conflict with *Jewett*" (Br. in Opp. 15),[2] respondents ignore that the gift tax reaches all direct and indirect transfers of "property, however conceptual or contingent" (*Jewett* v. *Commissioner*, 455 U.S. at 310 (quoting *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943)). Here, as in *Jewett*, the practical effect of Mrs. Irvine's disclaimer was "to reduce the expected size of [her] taxable estate and to confer a gratuitous benefit upon the natural objects of [her] bounty" (*Jewett* v. *Commissioner*, 455 U.S. at 310). Mrs. Irvine's disclaimer of her remainder interest in the trust—an interest which she renounced decades after its creation—unquestionably constitutes a "transfer of property by gift" (26 U.S.C. 2501(a)(1)) to which the gift tax applies under *Jewett*.

Section 25.2511-1(c)(2) of the Treasury Regulations (26 C.F.R. 25.2511-1(c)(2))—which respondents contend distinguishes this case from *Jewett* (Br. in Opp. 15)—merely creates a limited exception, or safe harbor, from application of the gift tax to disclaimers made "within a reasonable time" after the disclaimant became aware of the interest. 26 C.F.R. 25.2511-1(c)(2). If the disclaimer does not come within the narrow terms of the exception, it remains taxable under the statute and the general provisions of the regulation. See 26 C.F.R. 25.2511-1(c)(1) ("any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift

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[2] Recognizing that their purported distinction of *Jewett* is unpersuasive, respondents contend in the alternative that "*Jewett* should be reconsidered" (Br. in Opp. 28).

subject to tax"). Under any definition of a "reasonable time," Mrs. Irvine's 1979 disclaimer of her interest in a trust created in 1917—an interest of which she was aware by no later than 1932—does not qualify under the safe-harbor regulation. See *Jewett* v. *Commissioner*, 455 U.S. at 318-319.

Contrary to respondents' contention (Br. in Opp. 19), *Jewett* is not distinguishable from this case on the ground that the interest disclaimed by the taxpayer in this case was created before the gift tax was enacted in 1932. Respondents, and the court of appeals (see Pet. 14-15), have confused the transaction to which the gift tax applies: the tax applies to the 1979 disclaimer, not to the 1917 transfer in trust. In *United States* v. *Jacobs*, 306 U.S. 363 (1939), this Court emphasized this very distinction. In *Jacobs*, the Court rejected a taxpayer's claim that an estate tax provision enacted in 1924 could not be applied to include the assets of a trust created in 1909 into an estate formed after the statute was enacted (*id.* at 366-367):

> [T]he tax was not levied on the 1909 transfer and was not retroactive. * * * [T]he tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.

Here, as in *Jacobs*, the post-enactment transfer (by disclaimer) of an interest in the pre-enactment trust represented "a change in the nature of ownership of property [that] was designated by Congress as an appropriate occasion for the imposition of a tax." *Id.* at 371.

3. The decision of the court of appeals in this case is also in acknowledged conflict with the decision of the Eleventh Circuit in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991). The Eleventh Circuit concluded in *Ordway* that an identical, long-delayed disclaimer by Mrs. Irvine's brother of a remainder interest in the same trust is subject to the federal gift tax. The Eighth Circuit held in this case, by contrast, that Mrs. Irvine's disclaimer is not subject to the gift tax and that the contrary conclusion and analysis of the Eleventh Circuit in *Ordway* is "inappropriate and misplaced" (Pet. App. 8a).

Disagreeing with the court's understanding of its own opinion, respondents contend that "the *Irvine* and *Ordway* judgments do not present a square conflict" (Br. in Opp. 20) because "Mrs. Irvine's time for making an effective disclaimer * * * expired *before* enactment of the Gift Tax Act" (*ibid.*), while "Ordway's time for disclaimer did not begin to run until *well after* enactment of the gift tax" (*ibid.*). That alleged factual disparity, however, represents a distinction without a difference. Neither Mrs. Irvine nor her brother disclaimed their remainder interests in the Ordway trust until the termination of the trust in 1979, long after they had attained their majorities and become aware of their trust interests. It is irrelevant that Mrs. Irvine, but not Mr. Ordway, *could* have filed an effective disclaimer before the gift tax was in force. Because each of them waited a period of several decades to make the disclaimer in 1979, it cannot be said by any factual standard that the disclaimer either by Mr. Ordway or by Mrs. Irvine was made within a "reasonable time," as the safe-

harbor regulation requires. See *Jewett* v. *Commissioner*, 455 U.S. at 318-319. The disclaimers in both cases are therefore subject to the gift tax. See *ibid.*

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

JUNE 1993

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No. 92-1546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

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v.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

MOTION OF THE AMERICAN BANKERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The American Bankers Association respectfully moves, pursuant to Rule 37 of the Rules of this Court, for leave to file the attached brief as amicus curiae in support of the petition for a writ of certiorari. The Association has sought the consent of all the parties to this action, and the consent of the United States

has been received. It is attached hereto. The Respondents have declined to consent.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade and professional association of the United States' commercial banks. Assets of ABA member banks are approximately ninety percent of the industry total. Association members are located in each of the fifty states and the District of Columbia, and include both national banks and banks chartered by their respective states.

Approximately 3500 bank trust departments provide fiduciary services for their customers. These services consist of estate and trust administration, the filing of fiduciary and trust tax returns as well as other essential tasks in the estate and gift tax area.

In ABA's member banks there are considerable numbers of pre-1932 trusts under corporate fiduciary management which hold billions of dollars in assets.

As administrators of these and other trusts, it is essential that the banks be able to determine whether a contingent remainderman of a pre-1932 trust, who has made a disclaimer of his or her interest in the trust, has made a transfer subject to gift tax. As financial planners for bank clients it is essential that banks know definitively what steps an individual must take and the time frames involved, in order to make a valid disclaimer of that client's interests in a trust without incurring federal gift tax liability.

A split between the circuits clearly exists with respect to the issue of whether the federal gift tax regulations in effect at the time of the disclaimer

apply to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted in 1932.

This conflict places bank trust fiduciaries, no matter which position they take in regard to disclaimers of pre-1932 trusts, in a situation where their actions in the many jurisdictions in which they do business may be decided at some future date to be adjudged wrong and leave them open to an action for surcharge.

WHEREFORE, it is respectfully requested that the Court grant the American Bankers Association leave to file the attached brief as amicus curiae in support of the petition for a writ of certiorari.

Respectfully submitted,

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BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

The American Bankers Association hereby respectfully submits its brief as amicus curiae in support of the Petition for Certiorari in accordance with the provisions of Rule 37.2 of the Supreme Court Rules.

INTEREST OF THE AMICUS CURIAE

The American Bankers Association is the largest national trade and professional association of the United States' commercial banks.

In ABA's member banks there are considerable numbers of pre-1932 trusts under corporate fiduciary management which hold billions of dollars in assets. These numbers suggest that there are thousands of contingent remaindermen who, under the rule enunciated in *Irvine*, may still make a valid disclaimer under state law and who may choose to disclaim their interests in such trusts to avoid any gift tax consequences.

As administrators of these trusts, it is essential that banks be able to determine whether a contingent remainderman of a pre-1932 trust has made an effective disclaimer of his or her interest in the trust or has made a transfer subject to gift tax. As financial planners for bank clients, it is essential that banks know definitively what steps an individual must take and the time frames involved, in order to make a valid disclaimer of that client's interests in a trust without incurring federal gift tax liability.

A split between the circuits clearly exists with respect to the issue of whether the federal gift tax regulations in effect at the time of the disclaimer apply to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted in 1932.

Under the rule enunciated by the Eighth Circuit in *Irvine*, a remainderman of a trust created prior to the Gift Tax Act of 1932 need comply only with state law to perfect an effective disclaimer for federal gift tax purposes. *Irvine v. United States*, 981 F.2d 991, 996 (8th Cir. 1992). On the other hand, the Eleventh Circuit in *Ordway v. United States*, 908 F.2d 890, 895 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991), holds that a 1958 Regulation, which was in effect

when the disclaimer was made, applies to the disclaimer of all interests, including interests held in trusts created prior to 1932.

As the *Ordway* and *Irvine* cases are virtually identical in facts, there is now a split in the Circuits with respect to the requirements of a valid disclaimer for trusts created before the establishment of the federal gift tax system. Such confusion in the law is disruptive to our member banks both in their positions as administrators of trusts and as advisers in the estate planning process. This conflict places bank trust fiduciaries, no matter which position they take in regards to disclaimers of pre-1932 trusts, in a situation where their actions in the many jurisdictions in which they do business may be decided at some future date to be adjudged wrong and leave them open to an action for surcharge.

It is to protect the present and future conduct of bank trust departments in connection with disclaimers of interests in pre-1932 trusts that the American Bankers Association respectfully appears in this case in order to urge the Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

A key ingredient in the estate and gift tax planning process is the ability of estate planners to advise clients of the tax consequences of their proposed actions. This is particularly true for those individuals who are the beneficiaries of trusts which have been established in the past.

Many of the trusts for which ABA members are corporate fiduciaries were established before 1932. Of these trusts there are, according to the Petitioner,

"a significant number of individuals who have remainder interests. . . ." Pet. at 11 Due to the conflict between the circuits on the question of the tax treatment of certain disclaimers, bank trust departments that operate in many jurisdictions outside of the Eleventh and Eighth circuits are placed in an untenable position. How do they advise their clients in a vital part of the estate planning process?

Clients demand certainty which the banks cannot provide. If the banks advise clients according to the *Irvine* decision to disclaim their interests in pre-1932 trusts in accordance with state law, the banks may find that their advice has been adjudged incorrect sometime in the future, which will put them in a position where they are potentially liable for an action for surcharge. Bogert, *Trusts & Trustees* Rev. 2nd Ed. (1982), Section 862. By the same token, if banks advise clients that *Ordway* is the law, and that advice turns out to be deemed inaccurate, the same potential liability for surcharge exists.

As ABA members have billions of dollars of assets held in these trusts, the potential liability can be enormous.

The importance of predictability and uniformity to Congress in regards to disclaimers is shown by the enactment of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1846 which established a single set of definitive rules for disclaimers for purposes of estate, gift and generation-skipping transfer taxes. Before the Tax Reform Act of 1976 was enacted, only local law provided the rules governing the tax consequences of an effective disclaimer.

Beyond the subject of disclaimers is the question of the true definition of the term "taxable transfer."

Section 25.2511-(c)(2) clearly states that its requirements regarding disclaimers only pertain to "taxable transfers." A definition of "taxable transfer" appears in Section 25.2518-2(c)(3) which states that "with respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." This definition does not answer the question of whether a "taxable transfer" occurs if the transfer were never subject to a gift tax due to the fact that it occurred before a federal gift tax system was in existence.

This question regarding "taxable transfers" which has been answered in a different fashion by both the Eleventh Circuit and the Eighth Circuit[1] goes beyond the subject of disclaimers. Resolution of these differing viewpoints is essential in order to provide certainty to bank clients in the estate planning area and also to provide certainty for the banks themselves in the administration of trusts.

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[1] *Compare Irvine*, 981 F.2d at 995 with *Ordway*, 908 F.2d at 895.

CONCLUSION

The Petition For A Writ of Certiorari should be granted.

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JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of this Court, John G. Ordway, Jr. and Margaret M. Ordway hereby move for leave to file the attached brief *amicus curiae* submitted in support of the Petition for Certiorari. Consent for filing this motion was given by Petitioner and was lodged by it with the Clerk. Consent was requested of Respondents but was refused.

John G. Ordway, Jr. is the brother of the late Sally Ordway Irvine, for whom Respondents are the personal representatives. Like his sister, Mr. Ordway was the beneficiary of a trust established in 1917 by their grandfather, Lucius P. Ordway. Like Mrs. Irvine as well, upon the trust's termination in 1979, Mr. Ordway validly disclaimed

a portion of his interest in the trust corpus in accordance with state law. On their gift tax returns for the appropriate periods, Mrs. Irvine and Mr. Ordway each took the position that their disclaimers were not subject to federal gift tax because 1) the disclaimers were valid under state law, and 2) federal regulations imposing a gift tax on otherwise valid disclaimers could not be applied where the interest disclaimed had been created by a transfer in trust made prior to enactment of the Gift Tax Act in 1932. Petitioner United States of America, acting through the Internal Revenue Service, disagreed, and litigation ensued.[1]

After prevailing in the district court, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed, holding that the disclaimer was subject to federal gift tax. *See Ordway v. United States,* 908 F.2d 890 (11th Cir. 1990), *cert. denied,* 111 S. Ct. 2916 (1991). The facts in the *Ordway* and *Irvine* cases are "virtually identical" (Pet. App. 17a); the decision of the Eleventh Circuit in the Ordways' case "directly conflicts" with the decision in this case, as Petitioner correctly observes.[2]

The *Ordway* case, on remand from the Eleventh Circuit, remains pending in the United States District Court for the Southern District of Florida for the resolution of certain disputed valuation issues. *See Ordway v. United States,* No. 87-8187 (S.D. Fla.). As such, it would be governed by a decision of this Court in the *Irvine* case, as would *Johnson v. United States,* No. 89-8192 (S.D. Fla. filed Apr. 27, 1989), cited (Pet. 20) by Petitioner.

---

[1] Margaret M. Ordway, Mr. Ordway's wife, consented to being deemed to have made one-half of her husband's alleged gift. *See* 26 U.S.C. § 2513.

[2] Every judge participating in the Eighth Circuit's *en banc* decision in *Irvine* wrote or joined an opinion expressly acknowledging this direct conflict. *See* Pet. App. 7a-10a; 12a; 17a.

See James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991).

Mr. and Mrs. Ordway thus have a direct and substantial interest in this Court's disposition of both the Petition for Certiorari and the case on the merits. Mr. and Mrs. Ordway, moreover, bring to this Court arguments made by neither Petitioner nor Respondents. While they support the *Irvine* decision, for example, unlike Respondents they believe that its conflict with the *Ordway* decision generates important and recurring issues that this Court should resolve. And while they support the Petition for Certiorari, they are not bound to the view that *Irvine* was wrongly decided and advance arguments not made by Petitioner. Mr. and Mrs. Ordway thus believe that their brief *amicus curiae* presents arguments that would assist the Court in ruling on the Petition for Certiorari, and request that their motion be granted.

Respectfully submitted,

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April 22, 1993

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1546

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICUS CURIAE* OF JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF INTEREST

John G. Ordway, Jr. is the brother of the late Sally Ordway Irvine, for whom Respondents are the personal representatives. Like his sister, Mr. Ordway was the beneficiary of a trust established in 1917 by their grandfather, Lucius P. Ordway. Like Mrs. Irvine as well, upon the trust's termination in 1979, Mr. Ordway validly disclaimed a portion of his interest in the trust corpus in accordance with state law. On their gift tax returns for the appropriate periods, Mrs. Irvine and Mr. Ordway each took the position that their disclaimers were not subject

to federal gift tax because 1) the disclaimers were valid under state law, and 2) federal regulations imposing a gift tax on otherwise valid disclaimers could not be applied where the interest disclaimed had been created by a transfer in trust made prior to enactment of the Gift Tax Act in 1932. Petitioner United States of America, acting through the Internal Revenue Service, disagreed, and litigation ensued.[1]

After prevailing in the district court, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed, holding that the disclaimer was subject to federal gift tax. *See Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). The facts in the *Ordway* and *Irvine* cases are "virtually identical" (Pet. App. 17a); the decision of the Eleventh Circuit in the Ordways' case "directly conflicts" with the decision in this case, as Petitioner correctly observes.[2]

The *Ordway* case, on remand from the Eleventh Circuit, remains pending in the United States District Court for the Southern District of Florida for the resolution of certain disputed valuation issues. *See Ordway v. United States*, No. 87-8187 (S.D. Fla.). As such, it would be governed by a decision of this Court in the *Irvine* case, as would *Johnson v. United States*, No. 89-8192 (S.D. Fla. filed Apr. 27, 1989), cited (Pet. 20) by Petitioner. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991). Mr. and Mrs. Ordway thus have a direct and substantial interest in this Court's disposition of both the Petition for Certiorari and the case on the merits.

---

[1] Margaret M. Ordway, Mr. Ordway's wife, consented to being deemed to have made one-half of her husband's alleged gift. *See* 26 U.S.C. § 2513.

[2] Every judge participating in the Eighth Circuit's *en banc* decision in *Irvine* wrote or joined an opinion expressly acknowledging this direct conflict. *See* Pet. App. 7a-10a; 12a; 17a.

REASONS FOR GRANTING THE WRIT

1. The decisions of the Eleventh Circuit in *Ordway* and the Eighth Circuit in *Irvine* create an irreconcilable conflict as to rules properly governing estate and gift tax planning for which settled law is essential. In no area of personal affairs subject to the federal tax laws is uncertainty more disruptive than in connection with the taxability of voluntary and irrevocable decisions regarding the disposition of property. This Court has recognized that citizens are entitled to know what rules govern the tax consequences of such decisions, and to know that those rules will not be subject to retroactive revision or change. *See, e.g., Welch v. Henry,* 305 U.S. 134, 147-48 (1938). The conflict between the *Irvine* and the *Ordway* decisions has undermined this principle, and the Petition for Certiorari should be granted to resolve it.

The importance of certainty has been made plain by Congress itself in the very area of disclaimers. Congress amended the gift tax provisions in 1976 to eliminate the possibility that the taxability of disclaimers would vary as a function of geographical happenstance, and to impose new, objective standards governing the time within which disclaimers must be made. *See* 26 U.S.C. § 2518 (1976). The express purpose of the change, long recommended by professional study groups, was to assure "uniform treatment" of disclaimers, enabling taxpayers to decide whether or not to disclaim based upon a reliable understanding as to such action's tax consequences, and to know what would be required for a disclaimer to be effective for federal gift tax purposes. *See* H.R. Rep. No. 94-1380, 94th Cong., 2d Sess. 66-67 & n.5 (1976), *reprinted in* 1976 U.S. Code Cong. and Admin. News 3356, 3420-21 & n.5.

The conflict between the *Irvine* and the *Ordway* decisions generates precisely such uncertainty, frustrating taxpayers in their legitimate efforts to place their personal affairs in order and making the taxation of estate and

gift tax planning subject to arbitrary factors of geography and date. Pet. 21. In this very case, Mr. Ordway and Mrs. Irvine made "virtually identical" disclaimers of the remainder interests passing to them from the same transfer in trust. Pet. App. 17a. Both disclaimers indeed were validly made under Minnesota law. *See* Pet. App. 31a; *Ordway*, 908 F.2d at 895. Yet one but not the other has been held to be a taxable gift, the sole product of Mr. Ordways' decision made after his disclaimer to move his residence from Minnesota to Florida. Surely, significant estate planning decisions and their gift tax consequences should not turn on one's ability to relocate or one's misfortune in having done so. Such inequity in the application of the tax laws to similarly situated taxpayers long has been held to implicate fundamental federal concerns, *cf. United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970) (arbitrary differences in tax legislation violate Due Process Clause); *United States v. Kaiser*, 363 U.S. 299, 308-09 (1960) (Frankfurter, J., concurring) (same), and the Petition for Certiorari should be granted to eliminate that inequity.

2. Resolution of this case also will involve constitutional questions of broad applicability—not only of disclaimers and matters of trust administration and lifetime transfers, but also of the constitutional limitations on Congress's power generally to impose retroactive gift taxes. *Irvine* and *Ordway* differ fundamentally as to whether the settled expectations of donors will be honored and held safe from the retroactive effect of subsequent legislation. *Irvine* would prohibit a donor's intentions from being frustrated by subsequently-enacted and unanticipated gift tax legislation; *Ordway* permits it. The conflict is one of longstanding and constitutional dimension.

The constitutional principles limiting gift taxation were laid out in the early decades of this century, responding to the first congressional efforts to impose estate and gift

taxation. *See Lewellyn v. Frick*, 268 U.S. 238, 251-52 (1925); *Blodgett v. Holden*, 275 U.S. 142, 147 (1927), *modified*, 276 U.S. 594 (1928); *Untermyer v. Anderson*, 276 U.S. 440, 445 (1928). This Court in *Blodgett* and *Untermyer* twice struck down efforts to impose a gift tax, holding them to be retroactive and therefore violative of the Due Process Clause. These decisions recognized the importance of donors' settled expectations: donors are entitled to know the tax consequences of their irrevocable decisions, and should be confident that subsequent legislative changes will not subject those decisions to retroactive and unanticipated revisions. Congress responded in 1932 by establishing a gift tax which specifically provided that "[t]he tax shall not apply to a transfer made on or before the date of enactment of this act [June 6, 1932]." Revenue Act of 1932, § 501(b), 42 Stat. 169 (1932). *See also United States v. Darusmont*, 449 U.S. 292, 299 (1981).

The importance of settled expectation is visible as well in Congress's express decision to make the 1976 changes in the disclaimer law prospective only—defining prospectivity in terms of the date of the transfer creating the interest in property disclaimed. *See* Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1896 (1976). In so doing, Congress honored the intentions of donors and settlors who long before had launched transfers in reliance on then-existing law, and who no longer had the ability to reorder their affairs to accommodate subsequent gift tax law changes. Congress amended the disclaimer provisions again in 1981, and again made the changes prospective: applicable solely to disclaimers of property interests created in transfers occurring after the effective date of the legislation. *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 426(b), 95 Stat. 318 (1981).

This interpretation of Congress's solicitude toward the settled expectations of settlors and donors is widely held [3] and reflects the common sense notion that a donor can only rely on gift tax laws in existence and operative when he or she irretrievably parts with property in pursuit of legitimate efforts to place his or her personal affairs in order. Pet. 21. It recognizes the importance of estate and gift tax planning to many citizens, and the impropriety of subjecting those long-range planning decisions to unanticipated taxes that may rob the irrevocable decisions made in that context of any purpose. Finally, it accepts the legal effect and practical consequence of a disclaimer and squarely addresses the issue of retroactivity in this context by rejecting the taxation of pre-existing interests under subsequently-enacted rules.

Petitioner urges that the Court focus on the date when the disclaimer was made: "It is Mrs. Irvine's 1979 disclaimer, not her grandfather's 1917 transfer into trust, to which the gift tax applies." Pet. 14. That is not how disclaimers are analyzed for determining retroactivity, however. Only one transfer occurs on the valid disclaimer of a property interest—the transfer from the original settlor to his or her designated taker-in-default; for property law purposes, a disclaimer is a refusal to accept property *ab initio*. Austin W. Scott, *Trusts* § 36.1 (3d ed. 1967). Thus, only the date *of a transfer into trust* is relevant for determining whether an unconstitutionally retroactive gift tax has been imposed on a disclaimer, as Congress twice has expressly recognized. See p. 5, *supra*.

---

[3] "Statutory language is . . . construed as inapplicable to transfers that were launched before the provision in question was enacted, even though the transfer was completed by a post-enactment event . . . . and Congress has often prescribed grandfather clauses or delayed effective dates for statutory innovations that arguably would otherwise fairly destroy settled expectations." 5 Bittker, *Federal Taxation of Income, Estates & Gifts* 120-28 (1984).

Whether or not Congress's decades-old view as to the constitutional limit of its power to impose gift taxes is correct has squarely been placed in contention by the different rules of *Ordway* and *Irvine*. To the extent Congress continues to amend the gift tax provisions in keeping with its view of the constitutional prohibition against retroactivity—as it has since 1932—resolution of the conflict between *Irvine* and *Ordway* will significantly affect the course of future tax legislation.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfuly submitted,

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April 22, 1993

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-1546

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 23, 1993
CERTIORARI GRANTED ———— 1993

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-61

IRVINE, JOHN O., FIRST TRUST NATIONAL ASSOCIATION
a national banking corporation, as co-personal representative of the Estate of Sally O. Irvine

v.

UNITED STATES OF AMERICA

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
		John O. Irvine vs. United States of America
2-4-88	1	**COMPLAINT. Summons issued.**
		SUMMONS RETURNED SERVED *2-4-88*
		CASE ASSIGNED TO JUDGE MAGNUSON per Master List #116.
2-11-88	2	**SUMMONS RETD. SERVED by Certified Mail 2-4-88. (pk)**
4-4-88	3	**U.S. MOTION FOR ENLARGEMENT OF TIME, W/DECLARATION OF THOMAS D. SYKES. (pk)**
4-6-88	4	**ORDER (PAM/4-5-88) that U.S. shall have through 5-5-88 to file a response to serve/file a response to complaint. cc:attys (pk)**
5-5-88	5	**UNITED STATES' *ANSWER*. (pk)**

DATE	NR.	PROCEEDINGS
7-21-88	6	MINUTES (FEB) SCHEDULING CONFERENCE. (pk)
7-22-88	7	ORDER (FEB) that all TP action shall be authorized/commenced by 10-3-88; amendments to pleadings shall be authorized/filed by 12-1-88; discovery shall be completed on/before 2-1-89; non-dispositive motions shall be heard on/before 2-15-89; dispositive motions shall be filed/noticed/served on/before 3-1-89; this case shall commence trial upon further order of the court. cc:attys (pk)
2/2/89	8	STIPULATION AND ORDER (FEB, 2/1/89) amending scheduling order of 7/27/88: with cert. exceptions, discovery extended to 4/1/89 for certain depositions; non-disp. motions shall be heard on or before 4/15/89 with exceptions; disp. motions shall be filed, notice and served on or before 5/1/89; and that trial shall commence upon further order of the court. cc: attys (p5)
3-23-89	9	DEFTS NOTICE OF TAKING DEPOSITIONS OF COLE OEHLER at 12:00 Noon; ERNST & WHINNEY at 2:00 p.m., HARRY L. BOLTZ at 3:30 p.m., on March 29, 1989 and JOHN L. JERRY at 8:30 a.m.; JOHN G. ORDWAY, III at 1:00 p.m.; & JOHN G. ORDWAY, JR. at 3:30 pm. on March 30, 1989 in St. Paul, MN (jf)
	10	DEFTS NOTICE OF TAKING DEPOSITION OF JOHN O. IRVINE on 3-30-89 at 2:00 p.m., in St. Paul, MN (jf)
	11	DEFTS NOTICE OF TAKING DEPOSITION OF FIRST TRUST N.A., on 3-30-89 at 10 a.m., in St. Paul, MN (jf)

DATE	NR.	PROCEEDINGS
3-24-89	12	PLTFS NO/MO FOR PROTECTIVE ORDER, Ret. before FEB on 4-7-89 at 10:00 am. W/AFF. of Mary J. Streitz. (pk)
4/3/89	13	PLTFS NOTICE OF MOTION AND MOTION to compel discovery ret. 4/14/89 at 9:00 a.m. before Magistrate Boline. (ps)
	14	AFFIDAVIT of Mary J. Streitz. (ps)
	15	PLTFS AMENDED NOTICE OF MOTION AND MOTION for protective order ret. 4/14/89 at 9:00 a.m. before Magistrate Boline. (ps)
4/7/89	16	Affidavit of Thomas D. Sykes. (ps) [SEPARATE]
	17	AFFIDAVIT of Mary J. Streitz. (ps)
FOLDER II:		
1/14/89	II-18	MINUTES (FEB) Pltf's motions for protective order, to compel, and for additional time to take depositions—taken under advisement. (ps)
4/27/89	II-19	NOTICE OF MOTION AND MOTION of pltfs' for summary judgment ret. 6/16/89 at 9:00 a.m. before Judge Magnuson. (ps)
5/1/89	II-20	NOTICE OF MOTION AND MOTION of USA for summary judgment ret. 6/16/89 at 9:00 a.m. before Judge Magnuson. (ps)
6/1/89	II-21	MEMORANDUM OPINION AND ORDER (FEB, 5/31/89) re discovery. (ps)
6/6/89	II-22	AMENDED NOTICE OF TAKING DEPOSITION of Harry L. Boltz and John L. Jerry, Ernst & Whinney. John G. Ordway III, and John G. Ordway III. (ps)

DATE	NR.	PROCEEDINGS
	II-23	AMENDED NOTICE TO TAKE DEPOSITION of First Trust National Association. (ps)
6/8/89	II-24	AMENDED NOTICE OF TAKING DEPOSITION of John O. Irvine on 6/14/89. (ps)
6/13/89	II-25	NOTICE OF MOTION AND MOTION of USA for reconsideration of order time in which to conduct certain discovery ret. —— before Magistrate Boline. (ps)
	II-26	DECLARATION of Thomas D. Sykes. (ps)
6/19/89	II-27	ORDER (FEB, 6/16/89) that deft. may take any depositions of the five non-resident attorneys on or before 7/10/89. cc: attys (ps)
6/23/89	II-28	AMENDED NOTICE OF UNITED STATES' FOR PARTIAL SUMMARY JUDGMENT, RET. 7-14-89 at 11:00 A.M. before PAM, with Declaration of Thomas D. Sykes. (cf)
	II-29	NOTICE OF MOTION AND MOTION of pltfs for summary judgment on 7/14/89 at 11:00 a.m. before Judge Magnuson. (ps)
	II-30	AFFIDAVIT of John G. Ordway, Jr. (ps)
	II-31	AFFIDAVIT of John L. Jerry. (ps)
	II-32	AFFIDAVIT of Mary J. Streitz. (ps) [SEPARATE]
7/14/89	II-33	MINUTES (PAM/E. Anderson) cross motions for summary judgment taken under advisement. (ps)
7/28/89	II-34	NOTICE OF MOTION AND MOTION of pltfs. for enforcement of order compelling discovery and for sanctions ret. 8/11/89 at 9:00 a.m. before Magistrate Boline (ps)

DATE	NR.	PROCEEDINGS
	II-35	AFFIDAVIT of Mary J. Streitz. (ps) [SEPARATE]
8/2/89	II-36	AMENDED NOTICE OF MOTION AND MOTION of pltfs. for enforcement of order compelling discovery and for sanctions ret. 8/15/89 before Magistrate Boline. (ps)
8/11/89	II-37	DECLARATION of John D. MacEachen. (ps)
	II-38	DECLARATION of Thomas D. Sykes. (ps)
8/15/89	II-39	MINUTES (FEB) pltfs' motion to enforce order compelling discovery and for sanctions taken under advisement. (ps)
9/1/89	II-40	ORDER (FEB, 8/31/89) that deft. shall produce a document. In all other respects, pltfs' motion is denied. cc: attys ps)
09/18/89	II-41	MEMORANDUM & ORDER (PAM 9/18/89) that pltff's motion for summary judgment is GRANTED; deft's motion for summary judgment is DENIED. W/i 20 days for the date of this order, pltffs shall submit a statement of the amt of refund they seek, including accrued interest, claims for fees & costs. The deft shall have 10 days w/i which to respond (cc:attys) dd 10 pgs
9/27/89	II-42	STATEMENT of pltf. of amount of refund sought. (ps)
10/10/89	II-43	RESPONSE OF US to pltf's statement of amount of refund. (ps)
10/10/89	II-44	DECLARATION of Calvin E. Vaubel. (ps)
10/24/89	II-45	MEMORANDUM AND ORDER (PAM, 10/23/89) that plaintiffs shall recover $9,628,293.92 for gift tax and interest erroneously paid, plus $13,119,956.51 in inter-

DATE	NR.	PROCEEDINGS
		est accrued on such amount through September 30, 1989, for a total of $22,748,250.43. Plaintiffs shall- recover interest on the amount set forth in paragraph 1 from September 30, 1989, until the judgment is paid, according to law. cc: attys (ps)
	II-46	JUDGMENT entered (ps)
		CLOSED
12-21-89	II-46	DEFT'S NOTICE OF APPEAL TO THE EIGHTH CIRCUIT COURT OF APPEALS FROM JUDGE MAGNUSON'S ORDER OF 10-24-89.
		Delivered two certified copies and one uncertified copy of each of the following to the Court of Appeals, St. Paul office: Notice of Appeal, Order of 10-24-89, Judgment and District Court Clerk's Docket Entries. Copy of notice of appeal and docket entries mailed to counsel.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 89-5616MN

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representative of the Estate of Sally O. Irvine, APPELLEES

vs.

UNITED STATES OF AMERICA, APPELLANT

DOCKET ENTRIES

DATE	FILINGS-PROCEEDINGS
1989	
12-26	DOCKETED appeal.
12-26	CERTIFIED COPIES of notice of appeal, memo/ order and judgment of 10-24-89 and district court docket entries. (1) mjh
12-26	BRIEFING SCHEDULE: meth of appendix prep and Aplnt DR 1-5-90; Aple DR 1-16-90; Transcript 2-5-90; Appendix and Brief of Aplnt 2-15-90; Brief of Aple 3-19-90; Reply Brief 4-2-90.
1990	
Jan. 5	APPEARANCE for appellant. (Allen and Curtis) (2) lmt
Jan. 5	APPEARANCE for appellees. (Martin) (3) lmt
Jan. 5	APPEARANCE for appellees. (Streitz) (4) lmt

DATE	FILINGS-PROCEEDINGS
Jan. 5	APPEARANCE for appellees. (Kyle) (5)lmt
Jan. 5	APPEARANCE for appellees. (Oehler) (6)lmt
Feb. 12	MOTION BY APPELLANT for ext. of time to file brief—GRANTED TO 3/15/90 on 2/13/90. (7)sjo
Feb. 13	APLEE'S OPPOSITION to aplnt's motion for ext. of time. MOOT. sjo
Mar. 19	APPEARANCE for appellant. (Cohen) (8)sjo
Mar. 19	*BRIEF OF APPELLANT & ADDENDUM:* w/ ser 3/15 (31 pages) 7 copies (9)sjo
Apr. 20	*BRIEF OF APPELLEE* w/ser 4/18/90—7 copies (49pgs) (10)lmt
Apr. 20	*ADDENDUM OF APPELLEE* w/ser 4/18/90—7 copies (20pgs) (11)lmt (Cover color)
May 1	MOTION of appellant for an extension of time to file reply brief—MOTION GRANTED to 5/11 on 5/7 (12)dm
May 4	TO SCREENING (MG)
May 7	RETURNED FROM SCREENING—20 min
May 14	*REPLY BRIEF OF APPELLANT:* w/ser 5/11 (14 pages) 7 copies (13)s
August 2	*SET FOR ARGUMENT* SEPTEMBER IN ST. PAUL
Aug. 17	28(j) citation from aplnt. Sent to hearing panel 8/20. sjo
Aug. 31	REQUEST BY APLEES to file supplemental brief. (14)s. To presiding judge by RStV on 9/4.
Aug. 31	Rec'd 11 copies of supplemental brief of aplees. s

DATE	FILINGS-PROCEEDINGS
	Ret'd 11 copies of suppl. briefs to counsel on 9/5. sj
Sept. 5	ORDER: Aplees' request to file a supplemental brief to comment on a decision of the Court of Appeals for the Eleventh Cir. in *Ordway v. United States*, No. 89-5753 (11th Cir. Aug. 10, 1990) has been considered by the Ct. and is denied. (15
Sept. 6	APPEARANCE for appellant. (Cohen) (16)
Sept. 10	ARGUED AND SUBMITTED TO JUDGES MCMILLIAN, BRIGHT & BOWMAN at St. Paul, MN. Counsel for aplnt—Jonathan S. Cohen, DOJ. Counsel for aplee—Phillip H. Martin. No rebuttal. RECORDED. s
1991	
June 10	OPINION BY MCMILLIAN PUBLISHED; SEP/CONCUR. BY BRIGHT; DISSENT BY BOWMAN (17)
June 10	JUDGMENT: The judgment of the district court is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court. (18)
June 14	MOTION for extension of time to file petition for rehearing GRANTED TO AND INCLUDING JULY 8, 1991 on 6-14-91 (19) ema
June 19	OPINION CORRECTION (page 1) lk
July 8	PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC filed by appellees. To Ct. (20) lk
July 16	Response requested. Aplnt. aty requests additional time to file response. Add'l 4 days granted per LP. RESPONSE DUE: 7/30/91 lk

DATE	FILINGS-PROCEEDINGS
July 30	RESPONSE to petition for rehearing—to Ct. (21) mh
Sept. 20	ORDER: Appellees' petition for rehearing with suggestion for rehearing en banc is granted. The opinion and judgment of this court filed June 10, 1991, are hereby vacated. The parties may file supplemental briefs not to exceed fifteen pages within 30 days from the date of this order. This case will be set down for en banc rehearing on Monday, January 6, 1992, at 9:00 a.m. in St. Louis, Missouri. (22) ema
Oct. 3	ORDER: Motion for ext of time to file and serve simultaneous supplement briefs is granted to and including 10/28/91. (23) mam
Oct. 9	RECEIVED 15 additional copies of Brief of Appellee (pldg. #10); fifteen additional copies of Aplee Addendum (pldg. #11) and fifteen additional copies of Appendix for rehearing en banc.
Oct. 11	RECEIVED 15 extra copies of appellant's brf; 15 extra copies of reply brf of appellant. mam
Oct. 30	APPEARANCE OF APPELLANT (McLaughlin) (24) mam
Oct. 30	APPEARANCE OF APPELLANT (Peterson) (25) mam
Oct. 30	SUPPLEMENTAL BRIEF OF APPELLANT (18 copies) (26) mam
Oct. 30	SUPLEMENTAL BRIEF OF APPELLEE (18 copies) (27) mam
Dec. 13	*SET FOR ARGUMENT* January in St. Louis

DATE	FILINGS-PROCEEDINGS
1/6/92	APPEARANCE for appellant, attorney Michael L. Paup [110819] (lad)
1/6/92	RE-ARGUED SUBMITTED EN BANC IN ST. LOUIS TO JUDGES Donald P. Lay, Chief Judge, Myron H. Bright, Senior Judge, Theodore McMillian, Circuit Judge, Richard S. Arnold, Circuit Judge, John R. Gibson, Circuit Judge, George G. Fagg, Circuit Judge, Pasco M. Bowman, Circuit Judge, Roger L. Wollman, Circuit Judge, C. A. Beam, Circuit Judge, James B. Loken, Circuit Judge, David R. Hansen, Circuit Judge Michael L. Paup for Appellant USA, Phillip H. Martin for Appellees First Trust National, Appellees John O. Irvine, Rebuttal by: Mr. Michael L. Paul (DOJ). RECORDED. lad (lad)
12/28/92	THE COURT: Donald P. Lay, Myron H. Bright, Theodore McMillian, Richard S. Arnold, John R. Gibson, George G. Fagg, Pasco M. Bowman, Roger L. Wollman, C. A. Beam, James B. Loken, David R. Hansen OPINION filed by Pasco M. Bowman PUBLISHED [89-5616] [242504] (mjh)
12/28/92	JUDGMENT: Donald P. Lay, Myron H. Bright, Theodore McMillian, Richard S. Arnold, John R. Gibson, George G. Fagg, Pasco M. Bowman, Roger L. Wollman, C. A. Beam, James B. Loken, David R. Hansen: The judgment of the district court is AFFIRMED in accordance with the opinion. [89-5616] [242505] (mjh)
1/11/93	MOTION of aplees John O. Irvine, First Trust Natl. to recover costs. [89-5616] [252759] (mam)
1/27/93	MANDATE ISSUED [89-5616] (rmh)
2/2/93	RECEIPT for Mandate. [89-5616] [256872] (rmh)

DATE	FILINGS-PROCEEDINGS
2/4/93	ORDER filed: granting in part appellee motion recover costs [252759-1] by Appellees John O. Irvine, First Trust Natl. in the amount of $532.60. [89-5616] [258196] (mam)
2/16/93	Record Sent out of the office to lower court at the end of appellate proceedings. Records Included: three copies of cross motions for summary judgment TR. [89-5616] (mgj)
3/31/93	U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 3/23/93. Supreme Ct. Case No.: 92-1546 [89-5616] [280103] (mam)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. Action No. ———

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the Estate of Sally O. Irvine, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed February 4, 1988]

COMPLAINT

Plaintiffs, for their cause of action against Defendant, state and allege as follows:

PARTIES

1. Plaintiff John O. Irvine is an individual who is a resident of White Bear Lake, Ramsey County, Minnesota. Plaintiff First Trust National Association is a national banking corporation incorporated under the laws of the United States and has its principal place of business in Saint Paul, Ramsey County, Minnesota. Plaintiffs are the duly appointed co-personal representatives of the Estate of Sally O. Irvine. An authenticated copy of the order of the Probate Division of the District Court for the Second Judicial District in the State of Minnesota appointing Plaintiffs as co-personal representatives is attached hereto as Exhibit A.

2. Sally O. Irvine was born on December 23, 1910, and died on November 1, 1987. She was a resident of Minnesota for her entire life. Her Taxpayer Identification Number was 472-52-0843.

JURISDICTION

3. This is an action instituted under the Internal Revenue Code of 1986, as amended (the "Code"), for the recovery of Internal Revenue taxes and interest erroneously or illegally assessed against and collected from Sally O. Irvine, and the jurisdiction of this Court is based upon Title 28, United States Code, Section 1346(a)(1).

FACTUAL BACKGROUND

4. On January 16, 1917, Lucius P. Ordway, Sally O. Irvine's grandfather, then of Ramsey County, Minnesota, as settlor, created the "Ordway Trust" by a written trust instrument, and he transferred to the trustees thereof the assets described in said trust instrument, including 38,226 shares of the capital stock of Minnesota Mining & Manufacturing Company ("3M"). A copy of the trust instrument is attached hereto as Exhibit B.

5. The trust instrument creating the Ordway Trust provided that the Ordway Trust was to continue until the death of the survivor of the settlor's wife, Jessie G. Ordway, and his children, John G. Ordway, Samuel G. Ordway, Lucius P. Ordway, Jr., Katharine Ordway, and Richard Ordway. John G. Ordway was Sally O. Irvine's father.

6. Upon the death of the last survivor of the settlor's wife and children, the trust instrument provided for the termination of the trust and the distribution of the trust principal as follows:

> Upon the death of the survivor of my wife and children, and the termination of the aforesaid trust, said trustees shall pay over and transfer the trust

> fund in equal shares to each of my grand children per capita and not per sturpes (sic). If any of my grand children shall then have died leaving issue, said children shall be entitled to equal portions of the share of said deceased grand child.

7. Katherine Ordway, the last to die of the settlor's wife and children, died on June 27, 1979.

8. Upon the death of Katherine Ordway, twelve grandchildren of the settlor Lucius P. Ordway were then living, including Sally O. Irvine, one grandchild of the settlor had died leaving issue (children) then living, and one grandchild of the settlor had died without issue.

9. By reason of the death of Katharine Ordway on June 27, 1979, and Sally O. Irvine's survivorship of Katherine Ordway, Sally O. Irvine became finally ascertained as a remainder beneficiary of the Ordway Trust on June 27, 1979, and her interest then became indefeasibly fixed both in quality and in quantity as a one-thirteenth interest in the then distributable principal of the Ordway Trust.

10. On June 27, 1979, Sally O. Irvine had five children, all of whom were then living, namely Thomas E. Irvine, Jr., Horace H. Irvine, II, John Ordway Irvine, Sally Gilman Irvine Crow, and William Edwin Irvine.

11. On August 20, 1979, Sally O. Irvine executed a written Disclaimer (the "Disclaimer"), which was filed on August 21, 1979, in the District Court of Ramsey County, Minnesota. A certified copy of the Disclaimer was mailed to each of the trustees of the Ordway Trust on August 22, 1979. By the Disclaimer, Sally O. Irvine disclaimed five-sixteenths (31.25 percent) of her one-thirteenth remainder interest in the distributable principal of the Ordway Trust, which then included 8,283,000 shares of the capital stock of 3M. Sally O. Irvine expressly excluded from the operation of her Disclaimer any and all other interests which she had or may have had in

said one-thirteenth interest. A copy of the Disclaimer is attached hereto as Exhibit C.

12. The District Court of Ramsey County, Minnesota, by its Order dated September 6, 1979, after a hearing on September 4, 1979, found that Sally O. Irvine, acting under Minnesota Statutes § 501.211, had validly and timely disclaimed as of June 27, 1979, five-sixteenths (31.25 percent) of her one-thirteenth interest in the principal of the trust estate, *i.e.*, 5/208ths of the entire principal, and that as a result of said disclaimer each of her five children was entitled to 1/208th of the entire principal of the trust estate. A copy of the Order is attached hereto as Exhibit D.

COUNT I

Calendar Quarter Ending September, 1979

13. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 12 of this Complaint as if fully set forth herein.

14. On November 14, 1979, Sally O. Irvine timely filed her United States Quarterly Gift Tax Return (Form 709) for the calendar quarter ending September, 1979, reporting that she had made no taxable gifts during the calendar quarter and showing no tax due. In the return, she reported her disclaimer of 31.25 percent of her one-thirteenth remainder interest in the principal of the Ordway Trust, stated that the disclaimer was not subject to federal gift tax, and attached a copy of the Disclaimer to the return.

15. On March 19, 1982, Calvin E. Vaubel, an estate tax attorney with the Internal Revenue Service, informed Sally O. Irvine's counsel that the Internal Revenue Service had determined that the Disclaimer was a taxable gift for federal gift tax purposes.

16. On the same day (March 19, 1982), Sally O. Irvine filed an amended United States Quarterly Gift Tax Return (Form 709) for the calendar quarter ending Sep-

tember, 1979, reporting the disclaimer of 31.25 percent of her one-thirteenth remainder interest in the Ordway Trust as a taxable gift of 1/208th of the principal of the trust estate to each of her five children and showing tax due of $7,486,671, which she paid on that date.

17. By written notice dated March 31, 1982, from the Internal Revenue Service, Odgen, Utah, Sally O. Irvine was notified of a gift tax assessment dated March 31, 1982, for the tax period ended September 30, 1979, in the amount of $7,486,671, plus interest thereon of $2,086,627.51. She paid the interest on April 9, 1982.

18. On March 15, 1984, Sally O. Irvine filed with the Internal Revenue Service a Claim (Form 843), signed by her on February 14, 1984, for refund of gift taxes for the calendar quarter ending September, 1979, in the amount of $7,486,671, plus interest paid thereon of $2,086,627.51, together with interest on these amounts as provided by law. The Claim was filed within two years after the payment of such taxes and interest and, therefore, was timely filed. A copy of the Claim is attached hereto as Exhibit E.

19. Sally O. Irvine received a legal notice from the Internal Revenue Service dated March 26, 1987, stating that the Claim referred to in paragraph 18 of this Complaint was fully disallowed.

20. Plaintiffs have filed this action within two years of the date of the legal notice of disallowance referred to in paragraph 19 of this Complaint.

21. The Disclaimer by Sally O. Irvine was made pursuant to the provisions of Minnesota Statutes § 501.211, and the Disclaimer was timely, valid, and effective under the law of the State of Minnesota, the law governing the Ordway Trust and the disclaimer of any interest therein by Sally O. Irvine. The Disclaimer is by its terms unequivocal.

22. Sally O. Irvine had not accepted any part of the remainder interest in the Ordway Trust at the time of the

Disclaimer, and by the Disclaimer as authorized by Minnesota Statutes § 501.211, she refused ownership of 31.25 percent of the one-thirteenth remainder interest (being 5/208ths of the entire remainder interest) otherwise distributable to her but for the Disclaimer.

23. The Disclaimer by Sally O. Irvine was not a transfer taxable as a gift under the Code.

24. If it is held that the Disclaimer by Sally O. Irvine was a transfer taxable as a gift under the Code, then application of the gift tax to the Disclaimer would result in an unconstitutional taking of property without due process of law in violation of the Fifth Amendment to the United States Constitution.

25. Defendant, through its agent, has illegally and erroneously assessed against and collected from Sally O. Irvine gift taxes for the calendar quarter ending September, 1979, in the amount of $7,486,671, plus interest paid thereon in an amount of $2,086,627.51. These amounts, together with statutory interest as provided by law, are justly due and legally owing from Defendant to the Estate of Sally O. Irvine.

26. On information and belief, Sally O. Irvine never made any assignment or transfer of this claim, or any portion thereof or interest therein. Plaintiffs, on behalf of the Estate of Sally O. Irvine and all parties interested therein, are the sole owners of this claim and have made no assignment or transfer thereof, or any portion thereof or interest therein.

COUNT II

Calendar Quarter Ending September 1980

27. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 26 of this Complaint as if fully set forth herein.

28. On August 1, 1980, Sally O. Irvine created a charitable remainder annuity trust and transferred cash

in the sum of $120,000 to the First Trust Company of St. Paul as trustee thereof. The transfer of cash to the trustee of said trust constituted a taxable gift to the extent of the value of the income interest under the trust. The income beneficiaries of the income annuity were Louis F. Belland, age 71, and his wife Pearl M. Belland, age 54. Under the trust they were entitled to an annuity of $6,000 per annum payable annually until the death of the survivor of them. The value of the income interest under such an annuity, determined under the applicable Treasury Regulations, was $75,337.

29. On November 12, 1980, Sally O. Irvine timely filed her United States Quarterly Gift Tax Return (Form 709) for the calendar quarter ending September, 1980. In the return, she reported the transfer of $120,000 in cash to said charitable remainder annuity trust and reported a taxable gift thereby of $75,337. She further claimed annual exclusions in connection with the gift in the amount of $3,000 each for each of the two income beneficiaries, resulting in a net taxable gift of $69,337. The return showed total tax of $15,427.62 on the net taxable gift, which was offset entirely by her remaining unified credit against estate and gift taxes. Accordingly, the gift tax return as filed showed no gift tax due.

30. By letter dated June 15, 1982, from Calvin E. Vaubel of the Internal Revenue Service, Sally O. Irvine was advised that the adjustments on her gift tax return for the quarter ending September 30, 1979, would affect the tax payable on the return for the quarter ending September 30, 1980. Enclosed with the letter was a computation of the corrected tax on her return for the quarter ending September 30, 1980.

31. On September 15, 1982, Sally O. Irvine paid additional gift tax for the calendar quarter ending September, 1980, in the amount of $44,035.90, together with interest thereon of $10,959.51, in accordance with

the computation of the corrected tax by the Internal Revenue Service.

32. The adjustments referred to in paragraph 30 of this Complaint were made entirely as a result of the reporting of the Disclaimer as a taxable gift in Sally O. Irvine's amended United States Quarterly Gift Tax Return for the calendar quarter ending September, 1979. These adjustments were an increase in the total taxable gifts for prior periods by the amount of $12,120,530 as reflected in the amended return for the calendar quarter ending September, 1979, and a reduction of the available unified credit for the calendar quarter ending September, 1980, by $38,000, the amount of the unified credit claimed on said amended return.

33. On September 11, 1984, Sally O. Irvine filed with the Internal Revenue Service a Claim (Form 843), signed by her on September 4, 1984, for refund of gift taxes for the calendar quarter ending September, 1980, in the amount of $44,035.90, plus interest paid thereon of $10,959.51, plus statutory interest. The Claim was filed within two years after the date of payment of such taxes and interest and, therefore, was timely filed. A copy of the Claim is attached hereto as Exhibit F.

34. Sally O. Irvine received a legal notice from the Internal Revenue Service dated March 26, 1987, stating that the Claim referred to in paragraph 33 of this Complaint was fully disallowed.

35. Plaintiffs have filed this action within two years of the date of the legal notice of disallowance referred to in paragraph 34 of this Complaint.

36. The Disclaimer by Sally O. Irvine was not a transfer subject to any tax imposed under the Code and therefore the adjustments described in paragraphs 30 and 32 of this Complaint were erroneous.

37. Accordingly, Defendant, through its agent, has illegally and erroneously collected from Sally O. Irvine gift taxes for the calendar quarter ending September,

1980, in the amount of $44,035.90, plus interest paid thereon in the amount of $10,959.51. These amounts, together with statutory interest as provided by law, are justly due and legally owing from Defendant to the Estate of Sally O. Irvine.

38. On information and belief, Sally O. Irvine never made any assignment or transfer of this claim, or any portion thereof or interest therein. Plaintiffs, on behalf of the Estate of Sally O. Irvine and all parties interested therein, are the sole owners of this claim and have made no assignment or transfer thereof, or any portion thereof or interest therein.

COUNT III

Valuation of Disclaimed Remainder Interest

39. Plaintiffs hereby reallege each and every allegation of paragraphs 1 through 26 of this Complaint as if fully set forth herein.

40. On Sally O. Irvine's amended United States Quarterly Gift Tax return for the calendar quarter ending September, 1979, described in paragraph 15 of this Complaint, Sally O. Irvine reported the value of the 5/208ths remainder interest in the Ordway Trust (the portion disclaimed by her) to be $12,120,530.

41. The value of the disclaimed remainder interest was not more than $8,498,985, taking all relevant factors into account, including that the disclaimed interest was an indirect rather than a direct interest in the assets of the Ordway Trust, subject to the vicissitudes of administration of the trust, and that the value of the 8,283,008 shares of 3M common stock held by the Ordway Trust reflected in the value of the disclaimed interest as reported (*i.e.*, the mean of the high price and the low price of 3M stock on August 21, 1979) must be discounted substantially to arrive at the correct fair market value of this stock. Thus, the value of the disclaimed remainder interest as reported on Sally O. Irvine's

amended United States Quarterly Gift Tax Return for the calendar quarter ending September, 1979, was overstated to the extent of at least $3,621,545.

42. In the Claim described in paragraph 18 of this Complaint and attached hereto as Exhibit E, Sally O. Irvine included an alternative claim that the value of the disclaimed remainder interest as reported was overstated to the extent of at least $3,621,545. The Claim was timely filed as alleged in paragraph 18 of this Complaint.

43. As alleged in paragraphs 19 and 20 of this Complaint, Sally O. Irvine received a legal notice from the Internal Revenue Service dated March 26, 1987, stating that the Claim described in paragraph 18 of this Complaint was fully disallowed, and Plaintiffs have filed this action within two years of the date of the legal notice of disallowance.

44. If it is determined that the Disclaimer by Sally O. Irvine was a taxable gift and that application of the gift tax to the Disclaimer would not result in an unconstitutional taking of property, then, because the value of the gift was not more than $8,498,985, the gift tax liability of Sally O. Irvine for the calendar quarter ending September, 1979, was not more than $4,951,590, rather than $7,486,671, the amount of gift tax paid.

45. Defendant, through its agent, has illegally and erroneously assessed against and collected from Sally O. Irvine gift taxes for the calendar quarter ending September, 1979, in the amount of not less than $2,535,081, together with interest paid thereon in the amount of not less than $706,552.93. These amounts, together with statutory interest as provided by law, are justly due and legally owing from Defendant to the Estate of Sally O. Irvine.

46. On information and belief, Sally O. Irvine never made any assignment or transfer of this claim, or any portion thereof or interest therein. Plaintiffs, on behalf of

the Estate of Sally O. Irvine and all parties interested therein, are the sole owners of this claim and have made no assignment or other transfer thereof, or any portion thereof or interest therein.

PRAYERS FOR RELIEF

WHEREFORE, Plaintiffs pray that the Court enter judgment in their favor and against Defendant as follows:

(a) On Count I, recovery of gift taxes paid for the calendar quarter ending September, 1979, in the amount of $7,486,671 plus interest paid thereon in the amount of $2,086,627.51, together with statutory interest as provided by law.

(b) On Count II, recovery of gift taxes paid for the calendar quarter ending September, 1980, in the amount of $44,035.90, plus interest paid thereon in the amount of $10,959.51, together with statutory interest as provided by law.

(c) Alternatively, on Count III, recovery of gift taxes paid for the calendar quarter ending September, 1979, in the amount of not less than $2,535,081, plus interest paid thereon in the amount of not less than $706,552.93, together with statutory interest as provided by law.

(d) Interest, costs, disbursements, and attorneys' fees.

(e) Such other and further relief as the Court may deem appropriate.

Dated: February 4, 1988

DORSEY & WHITNEY

/s/ Philip H. Martin
PHILIP H. MARTIN
FAITH L. OHMAN
2100 First Bank Place East
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BRIGGS AND MORGAN

/s/ Cole Oehler
COLE OEHLER
RICHARD H. KYLE
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Saint Paul, Minnesota 55101
Telephone: (612) 291-1215

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-61

JOHN O. IRVINE and FIRST TRUST NATIONAL, a national banking corporation, as co-personal representatives of the Estate of Sally O. Irvine, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

UNITED STATES' ANSWER

The United States, by its counsel, answers the plaintiffs' Complaint as follows:

1. At this time lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first two sentences of paragraph 1 of the Complaint. Admits the allegations of the third and fourth sentences of the paragraph.

2. As to the allegations of paragraph 2: Currently lacks knowledge or information sufficient to form a belief as to the truth of the allegations of the second sentence of paragraph 2. Admits the rest of the allegations of the paragraph.

3. As to the allegations of paragraph 3: Admits that jurisdiction, to the extent it exists, is based upon Section 1346(a)(1) of Title 28, U.S.C. Admits that the action seeks to recover taxes and interest that were assessed and collected, but denies that the assessments were illegal

or erroneous in any way, and denies that it was illegal or erroneous for the Service to collect that tax and interest.

4. Admits the allegations of paragraph 4, but avers that the trust instrument in question transferred those assets to the trustees for the benefit of, *inter alia,* Sally O. Irvine, to whom the trust instrument gave, at the time of the creation of the trust, a contingent remainder interest in the principal of the trust.

5. Admits the allegations of paragraph 5.

6. Admits the allegations of paragraph 6.

7. Admits the allegations of paragraph 7.

8. Admits the allegations of paragraph 8, except lacks knowledge or information sufficient to form a belief as to the issue of grandchildren who had died.

9. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 9, except denies the allegations' implication that Sally O. Irvine was not a remainder beneficiary until she had survived Katharine Ordway.

10. Admits the allegations of paragraph 10.

11. Admits the allegations of paragraph 11, except lacks knowledge or information sufficient to form a belief about the truth of the allegations of the second sentence of the paragraph.

12. Admits the allegations of paragraph 12.

13. Realleges each and every response reflected in paragraphs 1 through 12 of this Answer as if fully set forth herein.

14. Admits the allegations of paragraph 14.

15. Lacks knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph 15.

16. Admits the allegations of paragraph 16.

17. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 17. Admits that interest in the amount alleged was paid on or about the date alleged.

18. Admits the allegations of paragraph 18, except denies that Exhibit A attached to the Claim (Exhibit E

to the Complaint), is a true copy of the Exhibit A that actually was attached to the Claim, and except lacks knowledge or information sufficient to form a belief as to whether attachments to Exhibit A are true copies of the items iriginally attached to original Exhibit A.

19. Admits the allegations of paragraph 19.

20. Admits the allegations of paragraph 20.

21. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 21.

22. Denies the allegations of paragraph 22.

23. Denies the allegation of paragraph 23.

24. Denies the allegations of paragraph 24.

25. Denies the allegations of paragraph 25.

26. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 26.

27. Realleges each and every response reflected in paragraphs 1 through 26 of this Answer as if fully set forth herein.

28. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 28.

29. As to the allegations of paragraph 29: Admits that the return described was filed on or about the date alleged, and admits that the return as filed showed no gift tax due. Lacks knowledge or information sufficient to form a belief as to the truth of the rest of the allegations of the paragraph.

30. Admits the allegations of paragraph 30, except alleges that the letter in question was sent to Sally O. Irvine's representative, Mr. Cole Oehler, and lacks knowledge or information sufficient to form a belief as to the contents of the computation of corrected tax referred to in the paragraph.

31. Admits the allegations of paragraph 31, except lacks knowledge or information sufficient to form a belief as to the truth of the allegation that it was paid "in accordance with" the Service's computation of corrected tax.

32. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 32.

33. Admits the allegations of paragraph 33.

34. Admits the allegations of paragraph 34.

35. Admits the allegations of paragraph 35.

36. Denies the allegations of paragraph 36.

37. Denies the allegations of paragraph 37.

38. Lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 38.

39. Realleges each and every response reflected in paragraphs 1 through 26 of this Answer as if fully set forth herein.

40. Admits the allegation of paragraph 40.

41. Denies the allegations of paragraph 41.

42. Admits the allegations of paragraph 42.

43. Admits the allegations of paragraph 43.

44. Denies the allegations of paragraph 44.

45. Denies the allegations of paragraph 45.

46. Lacks knowldege or information sufficient to form a belief as to the truth of the allegations of paragraph 46.

47. Denies that plaintiffs, or either of them, are entitled to the relief requested or to any relief whatsoever.

WHEREFORE, the United States requests that this action be dismissed with prejudice, and that costs be awarded to it.

JEROME G. ARNOLD
United States Attorney

/s/ Thomas D. Sykes
THOMAS D. SYKES
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 724-6322

(Certificate of Service Omitted in Printing)

Lucius P. Ordway Family Tree (Exhibit A to Affi

Lucius Pond Ordway
b. Jan. 21, 1862

d. Jan. 10, 1948

m. Apr. 29, 18

John Gilman Ordway
b. Jan. 20, 1886
d. Jan. 19, 1966

m. Dec. 21, 1909
to
Charlotte Wyman
Partridge
d. Aug. 27, 1974

Samuel Gilman Ordway
b. Jan. 2, 1887
d. May 31, 1942

m. Jan. 17, 1914
to
Mildred Wurtele

Lucius Pond O
b. Dec. 2, 189
d. Mar. 3, 196

m. 191
to
Josephine
d. Nov. 30, 19

m. Oct. 15, 19
to
Kay Dench
divorc

m. Mar. 17, 19
to
Ellen Glen

Sara Prudence (Sally)
b. Dec. 23, 1910
(Mrs. Thomas E. Irvine)
d. Nov. 1, 1987

Katherine (Polly)
b. Apr. 3, 1916
(Mrs. Craig Wallace)

Charlotte Partridge
b. May 27, 1917
(Charlotte S. Wyman)

Helen Partridge
b. May 16, 1920
(Mrs. John C. Wright)

John Gilman, Jr.
b. Nov. 29, 1922

Dorothy
b. Feb. 28, 1916
(Mrs. Charles J. Mills)

Joan
b. Dec. 17, 1918
(Mrs. Richard Tweedy)

Gilman Wurtele
b. May 7, 1925

Peter
b. Feb. 26, 19

John R. G.
b. Oct. 12, 19
d. Jan. 29, 19

Elizabeth
b. July 25, 19
d. Apr. 18, 19
(Mrs. Rich

avit of John G. Ordway, Jr. dated June 23, 1989) (Tr. Doc. II-31)

XHIBIT A

Jessie Gilman
b. Nov. 14, 1864
d. May 28, 1944

dway, Jr.

Katharine Ordway
b. April 3, 1899
d. June 27, 1979

Richard Ordway
b. Mar. 2, 1903
d. Jan. 24, 1976

m. Apr. 7, 1926
to
Glady Watson Ford
d. Feb. 12, 1989

reen

nning Frazer

No children

Gladys Alexandra
b. Apr. 25, 1927
(Mrs. Warren Bjorklund)

Mary Pond
b. Mar. 18, 1929
(Mrs. Ward Johnson)

Robert Ford
b. Mar. 31, 1932
d. Aug. 21, 1953

rd Dunn)

John Gilman Ordway
b. Jan. 20, 1886

d. Jan. 19, 1966

m. Dec. 21

Sara Prudence (Sally)
b. Dec. 23, 1910

m. 1934
Thomas Edward Irvine
d. 1-27-53

Katherine (Polly)
b. Apr. 3, 1916

m. Jan. 8, 1941
to
Craig Wallace
d. Apr. 11, 1987

Charlotte
b. May 26

m. Oct. 15
t
Tassos
(now
S. W

Thomas Edward Irvine, Jr.

b. Nov. 28, 1934

Horace Hills Irvine, Jr.
b. June 1, 1937

John Ordway Irvine

b. Feb. 16, 1941

Sally Gilman Irvine Crow
b. Mar. 26, 1943

William Edwin Irvine
b. July 8, 1948

Jessie Gilman Wallace
Peterson
b. Nov. 2, 1942

George Barclay Wallace
b. July 26, 1944

Charlotte Partridge
Wallace Murray

b. Feb. 18, 1946

Kristina
(also kn
b. Nov. 1

Antonia F
b. Oct. 3,

HIBIT A—Continued

Charlotte Wyman Partridge
b. Oct. 2, 1887

1909

d. Aug. 27, 1974

artridge
1917

Helen Partridge
b. May 16, 1920

John Gilman, Jr.
b. Nov. 29, 1922

1946

m. July 7, 1945
to
John Cushing Wright

m. June 28, 1947
to
Margaret McCarthy

I. Fondaras
ow as Charlotte
man)

ga Fondaras
wn as Tara Lamont)
1949

Charles Ames Wright
b. Dec. 9, 1946

John Gilman Ordway III
b. Mar. 13, 1948

ndaras
953

Edwin Partridge Wright
b. Dec. 25, 1947

Margaret Strand Ordway Quesada
b. Mar. 15, 1950

Stephen Ordway Wright
b. Feb. 25, 1950

Philip Wyman Ordway
b. Feb. 25, 1961

John Anthony Wright
b. Mar. 6, 1956

Lucius P. Ordway Trust created January 16, 1917 (Exhibit L to Affidavit of Mary J. Streitz dated June 21, 1989 (Streitz Affidavit)) (Tr. Doc. II-32)

EXHIBIT L

ORDWAY TRUST

This is a copy of the Ordway Trust Agreement certified to the town by the last item herein by Ella M. Boo.)

I, Lucius P. Ordway for and in consideration of the sum of One ($1.00) Dollar to me in hand paid, the receipt whereof is hereby acknowledged, do hereby grant, transfer and convey unto John G. Ordway, Samuel G. Ordway and Lucius P. Ordway, Jr., their successors and assigns, but in trust nevertheless for the following described uses, intents and purposes, that certain property hereafter described and herein termed the trust fund.

To have and to hold the same, together with all the herediments, and appurtenances thereunto belong from and to any wise appertaining to the said trustees and their successors in trust during the term of the lives of my wife Jessie G. Ordway, and my children John G. Ordway, Samuel G. Ordway, Lucius P. Ordway, Jr., Katharine Ordway and Richard Ordway, and the survivor of them.

Said trustees are hereby authorized and directed to hold and manage said property with power from time to time in their discretion, and upon their unanimous agreement, to sell the same or any part thereof and convert it into money, and to invest the proceeds thereof in such investments as they may deem best. Said trustees are further empowered at any time to lease the whole or any part of the realty comprised in said trust fund, and in their discretion to continue in force existing mortgages, and are hereby empowered to execute good and sufficient deeds and other instruments to so convey, transfer and lease the same. Unless so specifically provided by them said trustees shall not be required to give a bond or other instrument for the performance of said duties.

Said trustees are hereby directed to pay the income of said trust fund as follows:

To my wife Jessie G. Ordway the sum of Fourteen Thousaid Dollars per annum, payable in monthly installments during her life. The balance of the income of said trust fund shall be divided into five equal parts, it being my intention that each of my children shall be entitled to an equal proportion of the income of said trust fund. The shares of each of my adult children, John G. Ordway, Samuel G. Ordway, Lucius P. Ordway, Jr., shall be distributed to them at such times in the course of each year as shall be deemed by said trustees convenient and expedient. From the shares of my minor children, Katherin Ordway and Richard Ordway there shall be paid them, or expended for their account, until they reach the age of twenty-six (26) years, such a sum as in the discretion of said trustees shall be deemed by them necessary and desirable for their proper maintenance, education and support. On attaining said age of twenty-six (26) they shall receive their share of said income as herein provided for my adult children. The balance of the shares of said minor children, after payment of said expenses shall be invested by said trustees for their benefit, and allowed to accumulate, the income from said accumulated amount to be paid them on reaching the age of twenty-one (21), and the principal at best time as said trustee shall in their discretion deem advisable.

Said trustees shall keep proper books of account covering said trust fund property, and shall keep separate books covering the cumulative profit of the minor beneficiaries hereinbefore described.

I hereby provide that on the death of my wife, or on the death of any of my children without issue or husband or wife, the share of my said wife or child shall be distributed in accordance with the terms of this trust agreement to the other beneficiaries herein.

I further provide that on the death of any of my children leaving issue said trustees shall distribute said de-

ceased child's share of the income of the trust fund, two-thirds equally in the children of said deceased and bequeathed to the husband or wife as long as said survivor shall remain unmarried, and that on the remarriage of said surviving husband or wife it shall be within the discretion of said trustees whether to continue said payment or a part thereof to said husband or wife or to pay the total amount to the children of said survivor.

I further provide that if any of my children shall die without issue, but leaving a husband or wife surviving them, said wife shall receive one-half of the said deceased child's share of said income until her remarriage, when the continuation of said payment, or part thereof shall be in the discretion of the trustees hereof: and that said husband shall be paid such part of said income as said trustees in their discretion shall provide. The balance of the income of said deceased child shall be distributed in accordance with the terms hereof to the other beneficiaries herein.

I further provide that said trustees may, if deemed advisable by them, appoint one of their number in whose name as trustee the property in said trust fund, or any part thereof may stand.

I hereby provide that the number of my trustees shall be kept up to three and may by their unanimous agreement signified in writing be increased to four and whenever any vacancy shall occur if ever, that the surviving trustees shall by an instrument appoint a successor and that the title to said trust fund property shall pass to him by the mere fact of appointment.

Upon the * * * * the survivor of my wife and children and the termination of the aforesaid trust, said trustees shall come over and transfer the trust fund in equal shares to each of my grand children and care about not starving. If any of my grand children shall then have died leaving issue, said children shall be titled to equal portions of the share of said deceased grand child.

It is hereby provided that said trustees or the majority of them, may at any time by instrument in writing cancel, revoke and nullify trusts hereby declared, and re-convey said property to the grantor hereof.

The property included in said trust fund and hereby granted and conveyed is as follows:

Lots five (5), six (6), and seven (7), Block forty-five (45), Kittson's Addition to the City of St. Paul.

Lot one (1), Block Ten (10), except the easterly fourteen and one-half (14½) feet, Rice and Irvine's Addition to the City of St. Paul.

Lot two (2), Block ten (10) except the easterly fourteen and one-half (14½) feet, and except the northerly twenty (20) feet, Rice and Irvine's Addition to the City of St. Paul.

The undivided quarter (¼) of the west one-half (½) of Lot three (3), Block ten (10), St. Paul Proper.

All of said lots and blocks being in accordance with plats thereof on file and of record in the office of the Register of Deeds in the County of Ramsey.

That certain claim for thirty-five thousaid six hundred ($35,600.00) Dollars against Reuben Cohen of the City of Winnipeg, Manitoba, secured by mortgage on Lots one (1) and two (2), Block eleven (11) as shown on a plan of survey of part of Lot twenty-five (25) of the Parish of St. Boniface, registered in the Winnipeg Land Titles Office as Plan 249, said lots being in the City of Winnipeg in the Province of Manitoba.

One Hundred (100) shares of preferred stock in the United States Steel Corporation.

Fifty-one (51) shares of the capital stock of the Western Union Telegraph Company.

(Over)

Two (2) shares of the preferred and nine (9) shares of the common capital stock of the Elizabeth and Trenton Railroad Company.

One Hundred (100) shares of the capital stock of the Glory Branch.

Forty (40) shares of the Capital stock of the Provident Loan Society of St. Paul.

Thirteen (13) shares of the capital stock of the Interstate Investment Trustee Company.

Ten (10) shares of preferred capital stock of the Torrington Company.

Ten (10) shares of the preferred capital stock of the Mosler Safe Company.

Eighty-five (85) shares of the capital stock of the Mexican Northern Railroad Company.

Thirty-five hundred two and one-half (3502½), shares of the capital stock of the St. Paul Hotel Company.

One Hundred (100) shares of the common capital stock of the Baltimore & Ohio Railroad Company.

One Hundred (100) shares of the capital stock of the Illinois Central Railroad Company.

Twenty-five (25) shares of the common capital stock of the Minneapolis, St. Paul and Ste. Marie Railway Company.

Two Hundred Thirty-two (232) shares of the capital stock of the Missouri Pacific Railway Company.

Seven Hundred Seventy-five (775) shares of the capital stock of the Northern Pacific Railway Company.

Two Hundred Fifty (250) shares of the capital stock of the Great Northern Railway Company.

Fifteen (15) shares of the second preferred stock of American Malting Company.

Four (4) bonds of the United States Steel Corporation, being known as 10-60 Year 5% Sinking Fund Gold Coupon Bonds.

Thirty-eight Thousand Two Hundred Twenty-six (38,226) shares of the capital stock of the Minnesota Mining & Manufacturing Company.

Certificate of deposit No. 60 for bond of the Northwest Steamship Company.

Four Hundred Two (402) shares of the common capital stock of the E. P. Burton Lumber Company. Thirteen Hundred Seven (1307) shares of the first preferred stock of the E. P. Burton Lumber Company and Eight Hundred Four (804) shares of the second preferred capital stock of the E. P. Burton Lumber Company.

Thirty-seven (37) bonds of the town of Bois Island in the Dominion of Canada.

In witness whereof I have hereunto set my hand and seal this 16th day of January, 1917.

LUCIUS P. ORDWAY

In presence of:

BURT M. KING
C. A. FULLER

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

On this 16th day of January, 1917, before me personally appeared Lucius P. Ordway to be known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

BURT M. KING

(Notarial Seal)

Notary Public Ramsey County, Minn.
My commission expires March 16, 1923

ACCEPTANCE BY TRUSTEES

We, the said trustee above named join herein in token of our acceptance of the trust hereby conferred upon us.

SAMUEL G. ORDWAY
JOHN G. ORDWAY
L.P. ORDWAY, JR.
(Lucius P. Ordway, Jr.)

RESIGNATION OF TRUSTEE OF ORDWAY TRUST

I, Lucius P. Ordway, Jr., hereby tender my resignation as one of the trustees of the Ordway Trust being deed of trust from Lucius P. Ordway, dated January 16, 1917, and hereby consent that Richard Ordway be appointed trustee in my place.

Dated:

January 3, 1934

LUCIUS P. ORDWAY, JR.

APPOINTMENT OF NEW TRUSTEE

We, the undersigned, being the surviving trustees of that certain Deed of Trust of January 16, 1917 known as the Ordway Trust, hereby accept the resignation of Lucius P. Ordway. Jr., as one of the trustees of said Trust, and herewith appoint Richard Ordway as his successor.

JOHN G. ORDWAY
SAMUEL G. ORDWAY

Dated:

January 17, 1934

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Ella M. Boo being duły sworn deposes and says; that the foregoing instrument is a duplication and exact replica of the original instrument herein, and that the names and execution thereof were copied by her from the original, and are correct.

ELLA M. BOO

Subscribed and sworn to before me
this 25th day of January, 1934.

(Notarial Seal)

H. F. HADLER
Notary Public Ramsey Co., Minn.
My commission expires July 24, 1936.

Internal Revenue Service General Counsel Memorandum 27626 (Jan. 15, 1953) (Exhibit O to Streitz Affidavit)

EXHIBIT O

C:BRIEF
A-454559

In re: * * *

JOINT COUNSEL
BUREAL OF INTERNAL REVENUE

NORMAN A. SUGARMAN
Assistant Commisisoner (Technical)

Attention: *Read, Technical Rulings Division*

Reference is made to the proposed ruling letter (IT: AP:CA:STC:CB) addressed to the Internal Revenue Agent in Charge, * * * Such letter, submitted for review, concludes with the statement:

> "It is * * * believed that the Bureau should not continue in the efforts to assert gift tax liability in this case."

While this office is in agreement with the conclusion reached in the proposed letter, it is not in entire agreement with the reasoning used in reaching such conclusion. Accordingly, it is suggested that the proposed letter be revised to read substantially as follows:

> "Reference is made to your letter of March 23, 1951, Bureau letter of August 16, 1951, and your letter of May 26, 1952. A conference was held in this office on July 10, 1952, the alleged donor being represented by * * * and * * *
>
> "During the course of the conference, counsel for the estate submitted memoranda, and an affidavit executed by * * * The affidavit states that the al-

leged donor made the following declaration when the will was read to him on the day it was found:

> "I have got more than I can attend to. I don't want to be worried about settling the estate and I don't want any of * * * property. Do I have to take it?"

"Upon being advised by counsel that he could renounce any and all rights he had under the will, * * * on August 9, 1948, the day after the will was discovered, filed (an instrument of renunciation with the probate court having jurisdiction over the administration of [testator]'s estate). Such document reads as follows:

> 'Whereas * * * late of the county of * * * is dead, leaving a last will and testament dated the 18th day of September 1924, which will named * * as executor; and whereas under the terms of said will the bulk of the estate of said * * * was willed, given and bequeathed unconditionally to * * * and whereas said will was made many years ago and since said time conditions have changed;
>
> "I, the said * * * do hereby renounce my right to qualify as executor under said will in favor of * * * and request you to appoint said * * * as administrator of the estate of * * * with will annexed; and further believing it to be the wishes of my said nephew * * * for his brothers and sisters to eventually inherit his property, I therefore renounce my rights to inherit under said will or to receive any benefits under said will, and I specifically decline and refuse to receive any of the estate of said * * * under said will, to the end that his brothers and sisters may inherit the residue of his estate directly from him just as if he had died intestate as to the residue of his estate that was devised to me, and

I hereby request the court and the administrator to settle the estate of * * * in accordance with the terms of his will except that as to such parts of his estate that I would have inherited shall pass direct to the heirs of * * * just as if he had died intestate as to the residue of his estate, it being my desire and wish that his brothers and sisters shall immediately inherit direct from him all real and personal property, subject only to his specific bequests in total amount of * * * as specifically provided in his will. The consideration for this is my love and affection for my nephews and nieces referred to.

"Witness my hand and seal this 9th day of August 1946.

* * * (SEAL)'

"On August 12, 1946, the appropriate probate court decreed that—

> '* * * so much of said will as left any property to * * * is null and void and of no effect to pass title to any property real or personal or mixed of the estate of * * *' * * *
>
> 'all of said property of * * * except the specific devises of a total amount of * * * shall descend to and be distributed between the heirs at law of * * * just as if said * * * had died intestate as to the residue of his estate.'

"Counsel stated that the alleged donor was an uncle of the decedent * * * that they had been business associates, and that neither left a wife nor children. Counsel submitted, also, a chart showing the heirs of the decedent * * * and those of the alleged donor, their relationship to each heir and the amount inherited. This chart shows eleven persons who were heirs and natural objects of the bounty of both decedent * * * and the alleged donor,

and thus received benefits as a result of the renunciation. There is shown, also, three persons who were the heirs of the decedent * * * but not heirs of the alleged donor. Those persons benefited by the renunciation, of course. There is shown, as well, ten persons who were the heirs of the alleged donor, but not heirs of the decedent * * *. They were the natural objects of the alleged donor's bounty, and because of his renunciation, lost potential interests in property. In other words, this case is not the type wherein a renunciation causes property to pass to the natural objects of the bounty of decedent * * * who are the same natural objects of the bounty of the alleged donor.

"In *Perkins* v. *Isley,* 32 S.E. (2) 568, a North Carolina case, it is held that renunciation of a bequest is not a conveyance requiring the signature of the spouse of the party renouncing. The court said: 'The right to denounce a devise or legacy is a natural one and needs no statutory authorization. An heir at law is the only person, who, by the common law, becomes the owner of land without his own agency or consent. A title by deed or devise requires the assent of the granter or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir. 3 Washburn, 5th Ed.Sec. 4, p. 6.'

"It is therefore believed that the Bureau should not [continue in its efforts to] assert gift tax liability in this case. Such conclusion is founded on principles of law to the effect that the rights in the renounced property here stem from the will, the instrument of transfer, and not from the decedent * * * who renounced, nor from the * * * laws of succession. *Harris* v. *Commissioner,* 346 U.S. 111 (1950); Ianthe B. Hardenberg, *supra.* The object of a renunciation or disclaimer under a will is not to transfer property, but to prevent a particular transfer of property. *In re Myer's Estate,* 238 F.2d 597 (1951). A transfer of property can be made only by an instrument adapted to that purpose. In re Myer's Estate, *supra.* The

estate and gift tax provisions of the Code do not contemplate the taking of testamentary gifts by renunciation. *Brown* v. *Routzahn*, 68 F. (2d) 914, (CA-9, 1953), cert. denied, 290 U.S. 641. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject. *Brown* v. *Routzahn, supra.* When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation, the devise never takes effect, title never vests in the devisee, and such renunciation is effective as of the date of the death of the testator. *Perkins* v. *Isely, supra.*

"The cases of *William L. Maxwell,* 17 T.C. No. 196 and *Ianthe B. Hardenbergh,* 17 T.C. No. 166, aff'd, 198 F. (2d) 63 (CA-8, 1952) involved instances of renunciation of an inheritance rather than a legacy, bequest, or devise. The question at issue in the *Maxwell* case arose in the state of California as did the question *In re Kalt's Estate,* 108 P. 2d 401, cited in Bureau letter of August 16, 1951. However, the *Kalt* case can be distinguished on its facts, wherein the legatee renounced four years after the decedent's death, and admittedly took such action to defeat claims of his judgment creditors.

"The papers transmitted with your letter of May 26, 1952 are enclosed herewith. There is transmitted, also, the affidavit of * * * four memoranda submitted by counsel, and the chart previously referred to. You are requested to return these enclosures when they have served their purpose in your office."

The administrative file is returned herewith.

/s/ Charles W. Davis
CHARLES W. DAVIS
Chief Counsel
Bureau of Internal Revenue

Internal Revenue Agent in Charge

* * * * *

Dep. Comr. McLarney

* * * * *

Reference is made to your letter of March 23, 1951, Bureau letter of August 16, 1951, and your letter of May 26, 1952. A conference was held in this office on July 10, 1952, the donor being represented by * * * and * * *

The estate submitted several memoranda, also an affidavit of * * *. The affidavit is to the effect that the donor's real reason for the renunciation was, not that he desired the testator's heirs to receive the property, but that he already had more property than he could attend to, did not want to be worried about the estate and did not want any of the testator's property; that his counsel prepared the necessary documents and inserted language not actually necessary. Counsel also stated that the donor was decedent's uncle, that they had been business associates and that neither left any wife or children.

The Maxwell case, 17 T.C. —— No. 169, and the Hardenberg case, 17 T.C. 166, recently affirmed, were instances of renunciation, not of a devise, bequest or legacy, but of an inheritance, which feature was emphasized by the Court. It might be noted that the Maxwell case arose in California from which State arose the Halt case, 106 Pac. (2) 401, cited in Bureau letter of August 16, 1951, which holds contrary to the weight of authority.

It is probable that the question is not one of local law, but Perkins v. Isley, 32 S.W. (2) 523, a North Carolina case holds that a renunciation of a bequest is not a conveyance requiring the signature of the spouse of the party renouncing. The Court said: "The right to renounce a devise or legacy is a natural one and needs no statutory authorization. 'An heir at law is the only person, who, by the common law, becomes the owner of land without

his own agency or consent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir. He cannot disclaim if he would.' 3 Washburn, 5th Ed., Sec. 4, p. 6."

At the conference counsel submitted a chart showing the heirs of the testator and those of the donor, the relationship to each and the amount inherited. This chart shows eleven persons who were heirs of both the testator and donor. They were the natural objects of the bounty of both the testator and the donor and benefitted by the renunciation. There are also shown three persons who were the heirs of the testator but not of the donor and they of course benefited by the renunciation. There are also shown ten persons who were the heirs of the donor but not of the testator. They were the natural objects of the donor's bounty but did not benefit, in fact lost, by the renunciation. In other words, this is not the case as is sometimes found, of the renunciation causing the passing to the natural objects of the parties renouncing.

As you are undoubtedly aware, there are often facts which may be technically immaterial but may have a psychological effect. For example, assume a case where there is a specific bequest to A and residuary bequest to his children. A's renunciation causes his bequest to fall into the residue, thus benefiting the natural objects of his bounty. Assume another case in which as a result of the renunciation the property passes, not to the natural objects of the bounty of the renouncing party, but to the natural objects of the testator's bounty. In the former case the renunciation has much more the appearance of a gift than in the latter case. In this case the renunciation benefits some persons who were the natural objects of the bounty of both parties and some who were the natural objects of only the testator's bounty, and there are some persons who were the natural objects of the donor's bounty but would not benefit but in fact lost as

a result of renunciation. These facts may or may not be material, but very probably would have at least a psychological effect. A case in which the parties benefited by the renunciation are the natural objects of the bounty of the renouncing party, would be a better case to take into court. Also, on the power of appointment theory, there is some question as to whether the renunciation was an exercise or release of the power. The Bureau's case would be stronger had the power been created after the 1942 Act, and the renunciation after May 31, 1951.

It is therefore believed that the Bureau should not continue in its efforts to assert gift tax liability in this case. This is not to be taken as indicating an opinion that the position taken in Bureau letter of August 16, 1951, was incorrect. There is considerable basis for assertion of gift tax liability on three grounds: (1) That, even under general rules and under property law, renunciation is a gift; (2) that, assuming that for general purposes or purposes of property law renunciation is not a gift, it is a gift for Federal gift tax purposes; (3) that renunciation was an exercise of a power of appointment. The only reason for the Bureau's action in this case is that it is believed advisable to wait for a better case to get into Court.

The papers transmitted with your letter of May 26, 1952, are herewith enclosed. There are also transmitted the affidavit of * * * four memoranda submitted by counsel and the chart. You are requested to return these enclosures when they have served their purpose in your office.

Deputy Commissioner

Enclosures

Streitz Affidavit, Paragraph 18, page 5, together with Unnumbered Internal Revenue Service General Counsel Memorandum (May 3, 1956) (Exhibit P to Streitz Affidavit)

18. Attached as Exhibit P is a true and correct copy of an unnumbered G.C.M. (May 3, 1956) obtained by me from the FOIA Reading Room. I have carefully reviewed this G.C.M. and have concluded that the word "not" appears to be missing after the word "would" and before the word "have" in the seventh line of the second paragraph on page one. This seems clear from the fact that the balance of the document indicates that the Internal Revenue Service was considering a change from its policy not to apply gift tax to disclaimers where permitted under local law to a policy that would apply gift tax to disclaimers generally.

* * * * *

Excerpts from Brief of the Commissioner of Internal Revenue in *Kennedy v. Commissioner*, 7th Cir. No. 86-1489, 804 F.2d 1332 (7th Cir. 1986) (Excerpts from Exhibit R to Streitz Affidavit)

* * * * *

As held by the Tax Court, this case is controlled by the recent Supreme Court decision in *Jewett* v. *Commissioner, supra,* and pursuant to the Court's reasoning in *Jewett,* taxpayer's disclaimer was not made "within a reasonable time * * * of the transfer" as required by the Regulation.

The Supreme Court in *Jewett* held that the disclaimer of a contingent interest in a testimentary trust had to be made within a reasonable time from the creation of the trust, which was determined to be the relevant "transfer" for purposes of the Regulation. The Court expressly rejected the argument that the "reasonable time" did not begin to run until the interest became vested and possessory.[3] The Court rested its decision on the determination that the word "transfer" as used in the Regulation "is the basic term used in the gift tax provisions to describe any passage of property without consideration that may have tax consequences." *Jewett, supra* at 311 (emphasis in the original).

Applying the analysis of the Supreme Court in *Jewett* to this case, the relevant "transfer" for determining the timeliness of the disclaimer is the creation of the joint tenancy with right of survivorship. In 1953, when the

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[3] By so doing, the Court resolved a conflict with the Eighth Circuit in *Keinath* v. *Commissioner*, 480 F.2d 57 (1973) which held that "the holder of a vested remainder interest subject to divestiture had a reasonable time after the death of the life beneficiary within which to renounce or disclaim the remainder without tax consequences." *Jewett* v. *Commissioner, supra,* 455 U.S. at 309 n. 6. Specifically, the Court rejected the significance of the fact that "the holder of the remainder interest did not obtain a right to beneficial ownership and control of the property, until the death of the life beneficiary. Ibid.

joint tenancy was created, that transaction was a gift with tax consequences. This Court analyzed the tax consequences in *Lilly* v. *Smith*, 96 F. 2d 341 (1938) cert. denied, 305 U.S. 604 (1938), and found that the purchase of a home as tenants by the entirety, whereby the husband provided the entire consideration, is a gift to the wife and subject to the federal gift tax. This Court reasoned that it is the conveyance to both and not the death of one, that creates the estate which will ripen into a fee simple. Id. at 343. See also *Commissioner* v. Hart, 106 F. 2d 269 (3d Cir. 1939), holding that the act by one spouse in creating a tenancy by the entirety is a transfer of property subject to a gift tax, and *Johnston* v. *Commissioner*, 27 T.C.M. (CCH) 1401, 1408 (1968).[4]

With Section 2515 of the Internal Revenue Code of 1954, Congress provided prospectively that unless the spouse providing the major part of the consideration elects otherwise, a transfer of real property to a tenancy by the entirety or a joint tenancy between husband and wife with right of survivorship will not be regarded as a gift at that time. The relief provided by Section 2515 is prospective only, and applies after January 1, 1955. See Gift Tax Regulation, 25.2515-1(b) (26 C.F.R.).[5]

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[4] A tenancy by the entirety is not subject to unilateral severance, so the survivor is assured of ultimately becoming the full owner unless the parties act jointly to terminate the tenancy. In a joint tenancy with survivorship rights, the estate relevant here, either party can act unilaterally to sever his interest. See Stephens, Maxfield, Lind, *Federal Estate and Gift Taxation*, para. 9.04[1][b] (5th Ed. 1983.) This distinction has been recognized in the gift tax statute, in that a gift in the form of a joint tenancy with right of survivorship was valued at half the value of the property and a tenancy by the entirety was valued based on an actuary table. See Regulations 108, Gift Tax, Sections 86.2 and 86.19(h) (1943). Nevertheless, the gift tax applied to both transfers.

[5] Section 2515 was itself repealed by P.L. 97-34. Sec. 403(c)(3)(B) (Economic Recovery Tax Act of 1981), effective after December 31, 1981.

In this case, the parties stipulated that taxpayer's husband paid the entire consideration for the purchase of the property in 1953. (App. 4, para. 5, 6.) Because Section 2515 did not apply, the purchase of the property was a gift to taxpayer and subject to gift tax.[6] Thus, it was a taxable transfer. Based on the reasoning of *Jewett*, taxpayer should have disclaimed the survivorship interest within a reasonable time of the creation of the joint tenancy. Taxpayer disclaimed the interest in 1979, 26 years after the transfer creating the interest, not within a reasonable time. *Jewett* v. *Comissioner, supra,* at 318-319.

* * * * *

[6] The fact that taxpayer's husband may not have paid the gift tax is irrelevant. *Jewett, supra,* at 311 speaks of transfers that "may have tax consequences." See also H. Rep. No. 1337, 83d Cong., 2d Sess., 94 (1954), acknowledging that many couples have no intention of making a gift by their creation of a tenancy by the entirety nor do they have knowledge that they have done so.

Internal Revenue Service Private Letter Ruling 6612201590A (Dec. 20, 1966) (Exhibit X to Streitz Affidavit)

EXHIBIT X

Citation
6612201590A

2511.00-00
Transfers in General (Gift V. Not a Gift)

December 20, 1966

* * *
* * *

This refers to your letter of September 16, 1966, and prior correspondence, wherein you request a ruling with respect to the Federal gift tax and income tax consequences of a proposed renunciation by the above-named taxpayer of an income interest in a trust, described below, with respect to which she is presently a joint income beneficiary.

You ask whether the proposed disclaimer would be deemed a taxable gift under the provisions of section 2511 of the Internal Revenue Code of 1954. You also ask whether the income accruing to the disclaimed interest should be taxable to her under sections 652 and 662 of the Code.

* * * created an inter vivos spendthrift trust on December 7, 1933. The trust instrument provided for net income of the trust to be paid to the taxpayer's mother, * * * during her life.

Paragraph SECOND(b) of the trust provides, in part, the following:

'Upon the death of said * * * the trustees shall pay in convenient periodic installments not less frequently than quarterly the net income of the trust estate, share and share alike, to the children of said * * * who survive

her and to the issue per stripes of any child who may have predeceased her or not having predeceased her may die before the termination of the trust herein created.'

Under paragraph SECOND(d), the trustor directed that the trust terminate 21 years after the death of the last survivor of the children now living of said * * * and the Trustees shall thereupon divide the principal of the trust estate remaining after all proper charges as herein provided for and pay the same share and share alike among the grandchildren and the issue per stirpes of any deceased grandchild of said * * *

The trustor died on September 27, 1935. * * * died on January 4, 1936, survived by four children, * * * Each of * * * children received a one-quarter share of the trust income following her death.

* * * died on April 17, 1963, and * * * died on March 15, 1964, each survived by adopted sons. The Supreme Court of Pennsylvania held in an opinion entered on * * * (appeal of * * *), that the adopted sons were not entitled to succeed to the respective interest of their adopted fathers. Petition for reargument was denied on June 23, 1966. As a result of this decision, one-half of the income interests of the adopted sons became payable to * * * the taxpayer, and one-half to * * * Upon hearing of the Supreme Court decision, the taxpayer, through her attorneys, advised the trustee that she wished irrevocably and unqualifiedly to refuse to accept * * * income interest provided she could do so under Pennsylvania law. Counsel for the trustee subsequently advised her that she could. You also indicated that the taxpayer never accepted dominion and control over any portion of * * * interest. The trustees have retained all sums accruing with respect to that interest in a reserve account.

Section 2511(a) of the 1954 Code provides, in part, that the gift tax pertains to gifts indirectly made. On the other hand, section 25.2511—1(c) of the Gift Tax Regulations provides that 'Where the law governing the

administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent * * *, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In any case where a refusal is purported to relate only to a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law.'

An income beneficiary of a spendthrift trust may renounce a portion of that income interest under the law of Pennsylvania. See Gallagher v. Smith, 223 F.2d 218 (1955).

The trustor expressed his intent to have the income interest of his grandchildren devolve to their issue, we construe the intent of the trustor to provide that any renounced income interest by the grandchildren shall pass to their natural children.

In view of the foregoing, it is held that taxpayer's proposed renunciation will not result in a taxable transfer of the interest for gift tax purposes to her natural children if such renunciation is executed within a reasonable time from the time that she first received notice of her right to the additional income interest. If the proposed renunciation is executed at the present time, the execution would be effected within a reasonable time within the meaning of section 25.2511-1(c) of the regulations. Cf. Kathryn S. Fuller v. Commissioner, 37 T.C. 147 (1951). As indicated above, the taxpayer has not accepted the subject interest at the present time.

Section 652(a) of the Internal Revenue Code provides, in part, that the amount of income for the taxable year required to be distributed currently by a trust shall be included in the gross income of the beneficiary to whom the income is required to be distributed, whether distributed or not.

Section 301.3 of Title 20 of Purdon's Pennsylvania Statutes Annotated permits an income beneficiary of a Pennsylvania spendthrift trust to release or disclaim his right to income from the trust, provided that such released or disclaimed income passes to one or more of the beneficiary's descendants. The trust income proposed to be disclaimed by the taxpayer in the instant case would pass to her children.

Since the proposed disclaimer of trust income by the taxpayer would be effective and irrevocable under local law, the taxpayer would not be required to include in her gross income, under section 652(a) of the Code, the income subsequently accruing to the trust. However, income accrued to the trust which would be distributable to the taxpayer before she makes her disclaimer will be includible in her gross income, notwithstanding, the fact that it is actually paid to her children. Revenue Ruling 61-62, C.B. 1964-1 (Part 1) 221.

Very truly yours,

(Signed) Lester H. Wallace
Acting Chief, Estate and Gift Tax Branch

6612201590A

END OF DOCUMENT

Preamble to notice of proposed rulemaking and Prop. Treas. Reg. § 25.2511-1(c), 22 Fed. Reg. 53, 58 (Jan. 3, 1957) (Excerpts from Exhibit M to Affidavit of Mary J. Streitz dated July 27, 1989 (Tr. Doc. II-35)

[26 CFR (1954) Part 25]

GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

NOTICE OF PROPOSED RULE MAKING

Notice is hereby given, pursuant to the Administrative Procedure Act, approved June 11, 1946, that the regulations set forth in tentative form below are proposed to be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury or his delegate. Prior to the final adoption of such regulations, consideration will be given to any data, views, or arguments pertaining thereto which are submitted in writing, in duplicate, to the Commissioner of Internal Revenue, Attention: T:P, Washington 25, D.C., within the period of 30 days from the date of publication of this notice in the FEDERAL REGISTER. The proposed regulations are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

[SEAL]

O. GORDON DELK,
Acting Commissioner,
of Internal Revenue.

The following regulations relating to the gift tax are hereby prescribed under chapter 12 of subtitle B of the Internal Revenue Code of 1954 and under certain sections of subtitle F of the Internal Revenue Code of 1954. The regulations are applicable to gifts made after December 31, 1954:

* * * * *

§ 25.2511-1 *Transfers in general.* * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. The renunciation must be unequivocal and effective under local law. A renunciation is a complete and unqualified refusal to accept the property to which one is entitled. There can be no renunciation of property after its acceptance. A renunciation of only a portion of the property is not a complete and unqualified refusal to accept the property to which one is entitled. In the absence of acts to the contrary, the failure to renounce within a reasonable time after learning of the transfer to him will be presumed to constitute an acceptance of the property. If a joint income tax return is filed by a husband and wife for a taxable year, the payment by one spouse of all or part of the income tax liability for such year is not treated as resulting in a transfer which is subject to gift tax. The same rule is applicable to the payment of gift tax for a calendar year in the case of a husband and wife who have consented to have the gifts made considered as made half by each of them in accordance with the provisions of section 2513.

* * * *

TITLE 26—INTERNAL REVENUE

Chapter I—Internal Revenue Service, Department of the Treasury

PART 86—GIFT TAX UNDER CHAPTER 4 OF INTERNAL REVENUE CODE, AS AMENDED

SUPERSEDURE OF PART

CROSS REFERENCE: For supersedure of this part, see Title 26 (1954), Chapter I, Part 25, § 25.01, *infra*.

TITLE 26—INTERNAL REVENUE, 1954

Chapter I—Internal Revenue Service, Department of the Treasury

Subchapter B—Estate and Gift Taxes

[T. D. 6334]

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

On January 3, 1957, notice of proposed rule making regarding the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954 and under certain sections of subtitle F of the Internal Revenue Code of 1954 was published in the FEDERAL REGISTER (22 F. R. 53). After consideration of all such relevant matter as was presented by interested persons regarding the rules proposed, the following regulations are hereby adopted. The regulations are applicable to gifts made during the calendar year 1955 and subsequent calendar years:

* * * * *

Preamble to Treasury Decision 6334 and Treas. Reg. § 25.2511-1(c), 23 Fed. Reg. 8904, 8909-10 (Nov. 15, 1958) (Excerpts from Exhibit N to Affidavit of Mary J. Streitz dated July 27, 1989 (Tr. Doc. II-35))

§ 25.2511-1 *Transfers in general.* * * *

* * * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512—8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable

time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devises shall go to B, the residuary beneficiary), and under the local law A could refuse to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C and D.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Action No. 3-88-61

JOHN O. IRVINE and FIRST TRUST NATIONAL ASSOCIATION, a national banking corporation, as co-personal representatives of the Estate of Sally O. Irvine, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

PLAINTIFFS' ANSWERS TO UNITED STATES' INTERROGATORIES TO PLAINTIFF JOHN O. IRVINE AND UNITED STATES' INTERROGATORIES TO PLAINTIFF FIRST TRUST NATIONAL ASSOCIATION

Plaintiffs John O. Irvine and First Trust National Association hereby respond to United States' Interrogatories to Plaintiff John O. Irvine and United States' Interrogatories to Plaintiff First Trust National Association. Plaintiffs have not yet completed either their own internal gathering of facts and documents related to this action or their discovery. Therefore, in responding to the United States' Interrogatories, plaintiffs reserve the right to revise, correct, add to, supplement and clarify any of their responses.

INTERROGATORY NO. 1.01: State plaintiff's contention as to what the proper classification is, for purposes of the law of property prevailing in the State of Minnesota, of the interest that Sally O. Ordway had be-

tween January 17, 1917 and June 26, 1979 in the portion of the principal of the Ordway Trust that is the subject of this action (e.g., whether the interest is a contingent remainder).

ANSWER: Sally O. Irvine had a future interest in a class gift, subject to open and subject to divestiture.

INTERROGATORY NO. 1.02: If plaintiff contends that the interest referred to in the preceding interrogatory is *not* properly classified, for purposes of the law of property prevailing in the State of Minnesota, as a contingent remainder interest at all times during the period referred to in that interrogatory: (A) state in detail the facts upon which that contention is based; (B) state the identity and current location of each person having knowledge of those facts; and (C) provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases that contention.

ANSWER: The statement in the Answer to Interrogatory No. 1.01 is based on the Trust Agreement dated January 16, 1917 and Amendment to Trust Agreement dated July 22, 1943. Certified copies of the Trust Agreement and Amendment are in the custody of the Administrator of the District Court for the Second Judicial District, Ramsey County, Ramsey County Court House, Saint Paul, Minnesota 55101, in District Court File No. 365266, captioned "In the Matter of the Ordway Trust Created by Deed of Trust from Lucius P. Ordway dated January 16, 1917." Plaintiffs will produce copies of the Trust Agreement and Amendment at the offices of Dorsey & Whitney at a mutually convenient time pursuant to Rule 33(c) of the Federal Rules of Civil Procedure in lieu of describing the documents. A copy of the Trust Agreement also is attached to the Complaint as Exhibit B.

INTERROGATORY NO. 1.03: State plaintiff's contention as to what the proper classification is, for purposes of the law of property prevailing in the State of Minnesota, of the interest that Sally O. Irvine had as of June 28, 1979 in the portion of the principal of the Ordway Trust that is the subject of this action (e.g., whether the interest is a fee simple interest).

ANSWER: Sally O. Irvine had an equitable interest, as a trust beneficiary, in an undivided one-thirteenth interest in the trust assets remaining upon the windup of the trust administration.

INTERROGATORY NO. 1.04: If plaiintiff contends that the interest referred to in the immediately preceding interrogatory is *not* properly clasisfied, for purposes of the law of property prevailing in the State of Minnesota, as a fee simple interest: (A) state in detail the facts upon which that contention is based; (B) state the identity and current location of each person having knowledge of those facts; and (C) provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases that contention.

ANSWER: The statement in the Answer to Interrogatory No. 1.03 is based on the Trust Agreement dated January 16, 1917, trustees' accountings for the period after June 27, 1979, and Court Orders entered after June 27, 1979 with respect to this trust in the District Court for the Second Judicial District Ramsey County, File No. 365266, Saint Paul, Minnesota. Certified copies or the originals of these documents are in the custody of the Administrator of the District Court for the Second Judicial District, Ramsey County, Ramsey County Court House, Saint Paul, Minnesota 55101. Plaintiffs have a copy of the Trust Agreement in their custody or control and will produce it at the offices of Dorsey & Whitney at

a mutually convenient time pursuant to Rule 33(c) of the Federal Rules of Civil Procedure in lieu of describing the document. A copy of the Trust Agreement also is attached to the Complaint as Exhibit B. Plaintiffs are continuing to attempt to determine whether they have custody or control of copies of the remaining documents identified in this Answer.

INTERROGATORY NO. 1.05: Describe, by date and amount, each payment made to Sally O. Irvine from the principal or income of the Ordway Trust, and state whether each such payment was derived from principal or income.

ANSWER:

(a) As to principal:

Pursuant to the Trust Agreement dated January 16, 1917, Sally O. Irvine, prior to the death of Katharine Ordway on June 27, 1979, was not entitled to receive any principal from the Ordway Trust. To the best of plaintiffs' information and belief, no principal payments were made to Sally O. Irvine at any itme before September 6, 1979. The only principal payments to Sally O. Irvine of which plaintiffs are aware were those made upon final distribution of the Ordway Trust to the remainderman pursuant to court proceedings to wind up the trust. Payments of principal cash were made to Sally O. Irvine in the amounts of $1,299,501.28 on or about September 6, 1979, and $52,170.91 on or about December 1, 1980. In addition, Sally O. Irvine received the following shares of stock between October 22, 1979 and December 11, 1979:

STOCK	SHARES
Economics Laboratory, Inc.	1,110
International Business Machines Corp.	3,384
Merck & Co., Inc.	687
Minnesota Mining and Manufacturing Company	438,043
Northwest Bancorporation	1,375
St. Paul Companies, Inc.	1,375

STOCK	SHARES
Smithkline Corporation	1,375
Weyerhauser Company	1,322
Xerox Corporation	951

(b) *As to income*:

Plaintiffs object to this aspect of the Interrogatory on the ground that it is unduly burdensome, calls for irrelevant information and is not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiver of these objections, plaintiffs state that Sally O. Irvine was not entitled before January 19, 1966 to receive any distribution of income from the Ordway Trust. To the best of plaintiffs' information and belief, no income payments were made to Sally O. Irvine before January 19, 1966. Two seventy-fifths (2/75th) of the income from the Ordway Trust was paid to Sally O. Irvine from and after the death of her father, John G. Ordway, on January 19, 1966, in accordance with the trust instrument. Sally O. Irvine's share of income increased as of August 27, 1974 as a result of the death of her mother, Charlotte P. Ordway, and remained the same, namely one twenty-fifth (1/25th), until the death of Katharine Ordway on June 27, 1979. As a result of Sally O. Irvine's disclaimer referred to in paragraph 11 of the Complaint, from the death of Katharine Ordway until the winding up of the Ordway Trust was complete, Salley O. Irvine received 68.75% of one-thirteenth of the income from the Ordway Trust.

INTERROGATORY NO. 1.06: State the identity and current location of each person having knowledge of each payment referred to in the immediately preceding interrogatory.

ANSWER: Subject to and without waiver of their objections stated in the Answer to Interrogatory 1.05, plaintiffs state that each of the following persons, who were trustees of the Ordway Trust during the period from

the first date on which Salley O. Irvine became entitled to receive any income from the Trust, January 19, 1966, through the date on which complete distribution of the Ordway Trust was made, have the requisite knowledge for some or all of this period:

(a) John G. Ordway, Jr.
1000 Pioneeer Building
Saint Paul, Minnesota 55101

(b) Harry L. Holtz
1775 Lexington Avenue
Mendota Heights, Minnesota 55120

(c) John G. Ordway, III
73 Tamarack
Mahtomedi, Minnesota 56115

(d) First Trust National Association
(formerly First Trust Company of Saint Paul)
First National Bank Building
P.O. Box 64704
Saint Paul,. Minnesota 55164-0704
Attn: John L. Jerry

Willard J. Patty, Jr., Ernst & Whinney, 1700 World Trade Center, Saint Paul, Minnesota 55101, also has knowlege of such payments for this period.

INTERROGATORY NO. 1.07: Provide a description of, state the nature and current location of, and identify and state the current location of each person who has custody of, each document or record that reflects the amount or date of each payment referred to in Interrogatory No. 1.05, *supra*.

ANSWER: Subject to and without waiver of their objections stated in the Answer to Interrogatory No. 1.05, plaintiffs state that the Administrator of the District Court for the Second Judicial District, Ramsey County, Minnesota, is the custodian of File No. 365266,

captioned "In the Matter of the Ordway Trust Created By Deed of Trust from Lucius P. Ordway dated January 16, 1917," in which may be found original annual or interim accountings of the administration of the Ordway Trust for the period from January 1, 1966 through the date on which final distribution of all trust assets and income was made. John L. Jerry, First Trust National Association, First National Bank Building, P.O. Box 64704, St. Paul, Minnesota 55164-0704, has custody of copies of two of those accountings, for January 1, 1978 to December 31, 1978 and January 1, 1979 to June 27, 1979. Plaintiffs will produce the copies of the two accountings at the offices of Dorsey & Whitney at a mutually convenient time pursuant to Rule 33(c) of the Federal Rules of Civil Procedure in lieu of describing the documents. Plaintiffs are continuing to attempt to determine whether they have custody or control of copies of the remaining accountings.

Plaintiffs object to this Interrogatory to the extent it requires them to locate, identify, and describe documents containing the raw data which are summarized in the annual or interim accountings contained in the Court File referred to above, on the same grounds as those stated in their Answer to Interrogatory No. 1.05.

INTERROGATORY NO. 1.08: State whether plaintiff contends that Sally O. Irvine had not, at least by the time she reached the then-prevailing age of majority, obtained actual knowledge of the fact that the trust instrument in question (see paragraph 6 of the Complaint) provided that she would, if certain contingencies occurred or were met, receive a share of the principal of the Ordway Trust upon that trust's termination.

ANSWER: On the basis of information that plaintiffs have been able to obtain to date, plaintiffs do not make this contention.

INTERROGATORY NO. 1.09: If plaintiff makes the contention referred to in the immediately preceding in-

terrogatory: (A) state in detail the facts upon which that contention is based; (B) state the identity and current location of each person having knowledge of those facts; and, (C) provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases that contention.

ANSWER: Not applicable.

INTERROGATORY NO. 1.10: State in detail plaintiff's contention or contentions as to the reason or reasons why Sally O. Irvine did not execute a disclaimer document of the nature of that described in paragraph 11 of the Complaint during: (A) the decade ending December 31, 1939; (B) the decade ending December 31, 1949; (C) the decade ending December 31, 1959; (D) the decade ending December 31, 1969; or (E) the nine-year period ending December 31, 1978. As to each contention: State in detail the facts upon which it is based; state the identiy and current location of each person having knowledge of those facts; and, provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases the contention.

ANSWER: Plaintiffs object to this Interrogatory on the ground that it calls for irrelevant information, is not reasonably calculated to lead to the discovery of admissible evidence, and, with respect to the decade ending December 31, 1969 and the nine-year period ending December 31, 1978, may call for disclosure of information protected by the attorney-client privilege.

INTERROGATORY NO. 1.11: State the current address of each person identified in paragraph 10 of the Complaint.

ANSWER:

(a) Thomas E. Irvine, Jr.
10495 Hadley Avenue North
White Bear Lake, Minnesota 55110

(b) Horace H. Irvine, II
20 Louisberg Square
Boston, Massachusetts 02108

(c) John O. Irvine
2503 Manitou Island
White Bear Lake, Minnesota 55110

(d) Sally I. Crow
181 Franklin
Denver, Colorado 80218

(e) William E. Irvine
Post Office Box 216
Encampment, Wyoming 82325

INTERROGATORY NO. 1.12: State in detail plaintiff's contention or contentions as to the reason or reasons why the amended United States Quarterly Gift Tax return referred to in paragraph 40 of the Complaint reported the value of the disclaimed property or interest to be $12,120,530 rather than $8,498,985, the value now alleged by plaintiff. As to each contention: State in detail the facts upon which it is based; state the identity and current location of each person having knowledge of those facts; and, provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases the contention.

ANSWER: Plaintiffs contend that the reasons why the amended United States Quarterly Gift Tax return referred to in paragraph 40 of the Complaint reported the value of the disclaimed property or interest to be

$12,120,530 rather than the lower value alleged by plaintiffs in their Complaint are as follows:

1. The taxpayer, Salley O. Irvine, believed (i) that it was essential to stop the running of interest, then accruing at or near record high rates, on any possible deficiency in her gift taxes; (ii) that filing an amended return quickly, paying at least the amount of tax that would be due upon a completely adverse determination on audit, was the best way to curtail the running of such interest; and (iii) that there were grounds to believe, on the merits of the substantive issue of whether her disclaimer constituted a taxable gift, that no gift tax was due and thus that any amount she paid might be recoverable in a refund action, plus interest at the same rate she would have been required to pay had she not paid the possible deficiency;

2. The necessity for acting quickly to stop the running of interest precluded consideration of all relevant valuation factors, including those which resulted in the conclusion that the valuation reported in the amended return had been overstated; and

3. The valuation reported in the amended return was not based on any expert appraisal of the value of the disclaimed property or interest.

All of these contentions are based on the understanding of Sally O. Irvine's legal advisors as to the reasons that Sally O. Irvine reported the value that she did on her amended return.

The identity and current location of the persons having knowledge of the facts upon which these contentions are based are Cole Oehler and Richard H. Kyle, both at Briggs and Morgan, 2200 First National Bank Building, St. Paul, Minnesota 55101.

Plaintiffs do not base these contentions on any documents or records.

INTERROGATORY NO. 1.13: State in detail the facts upon which that allegations in the first sentence of

paragraph 41 of the Complaint are based; state the identity and current location of each person having knowledge of those facts; and, provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record upon which plaintiff bases those allegations.

ANSWER: The allegations in the first sentence of paragraph 41 of the Complaint were based on statements made by experts retained in anticipation of litigation. Persons having knowledge of any of these statements and custody of documents and records containing any of these statements are the experts themselves, the undersigned attorneys, and plaintiffs. Plaintiffs object to providing any more detailed response to the Interrogatory, other than to provide information also called for by Interrogatory No. 1.14, on the ground that the Interrogatory calls for information not permitted to be discovered by interrogatory pursuant to Rule 26(b)(4) of the Federal Rules of Civil Procedure. Plaintiffs also object to this Interrogatory to the extent it calls for identification and description of the contents of documents protected by the work product doctrine. As stated in the Answer to Interrogatory No. 1.14, plaintiffs have not yet reached a final decision on who they expect to call as an expert witness at trial. Plaintiffs will supplement their Answer to Interrogatory No. 1.14 after they make their decision.

INTERROGATORY NO. 1.14: State the identity and current location of each person whom plaintiff expects to call as an expert witness at trial. As to each such person: State the substance of the opinions to which he or she is expected to testify, and provide a summary of the grounds for each opinion; state the substance of the facts to which he or she is expected to testify, i.e., state the substance of the facts known to the person in relation to the opinion testimony that the witness is expected to offer.

ANSWER: Plaintiffs have not yet reached a final decision on who they expect to call as an expert witness at trial. Plaintiffs will supplement their response to this Interrogatory after they make their decision.

INTERROGATORY NO. 1.15: Provide a description of, state the nature and current location of, and identify and state the current location of the person who has custody of, each document or record that reflects an assessment, appraisal, or evaluation of the 8,282,008 shares of stock referred to in paragraph 41 of the Complaint, or any fraction or portion of those shares, regardless of the date upon which the assessment, appraisal, or evaluation was done, and regardless of the date to which the assessment, appraisal or evaluation relates.

ANSWER: Plaintiffs object to this Interrogatory to the extent it calls for information about "assessments" on the ground that it is vague.

Plaintiffs object to this Interrogatory to the extent it calls for information about appraisals or evaluations made by experts retained or consulted in anticipation of litigation, other than to provide information also called for by Interrogatory No. 1.14, on the ground that the Interrogatory calls for information not permitted to be discovered by interrogatory pursuant to Rule 26(b)(4) of the Federal Rules of Civil Procedure. Plaintiffs also object to this Interrogatory to the extent it calls for identification and description of the contents of documents protected by the attorney-client privilege and work product doctrine. As stated in their Answer to Interrogatory No. 1.14, plaintiffs will provide the information called for by Interrogatory No. 1.14 as soon as they have decided who they will call to testify as an expert witness at trial.

Subject to and without waiver of these objections, plaintiffs state that there are no appraisals or evaluations of the 8,282,008 shares of stock referred to in paragraph 41 of the Complaint, or any fraction or portion of those

shares, other than appraisals or evaluations made by experts retained or consulted in anticipation of litigation.

Dated: October 5, 1988

As to objections:

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Internal Revenue Service General Counsel Memorandum 38958, 1991 I.R.S. G.C.M. Lexis 34 (Sept. 9, 1991) (Appendix C of Supplemental Brief of Appellees John O. Irvine and First Trust National Association filed in the Eighth Circuit Oct. 28, 1991)

1991 IRS GCM LEXIS 34

G.C.M. 39858

"This document is not to be relied upon or otherwise cited as precedent by taxpayers."

SECTION 2518
DISCLAIMERS 2518-0000

ACTION-DOC: No underlying document.

September 9, 1991

REFERENCE: [*1]

CC:EE:TR-45-1352-90
Br5:MLGompertz

TEXT:

Disclaimer of Qualified Plan Benefits and Benefits under an Individual Retirement Account or Individual Retirement Annuity

JOHN E. BURKE

Assistant Commissioner (Employee Plans and Exempt Organizations)

Attention: Director, Employee Plans Technical and Actuarial Division

This memorandum is in response to your memorandum of January 26, 1989, requesting our consideration of issues arising from a disclaimer of benefits under a qualified plan or an individual retirement account pursuant to section 2518 of the Internal Revenue Code.

ISSUES

1. Whether a disclaimer of benefits under a qualified plan constitutes either (A) an assignment or alienation of plan benefits contrary to section 401(a)(13) of the Code and section 206(d) of ERISA [1] or (B) an assignment of income.

2. Whether a disclaimer [*2] of benefits from either an individual retirement account or an individual retirement annuity (IRA) constitutes an assignment of income, and whether such a disclaimer is contrary to sections 408(a)(4) or 408(b)(1) of the Code.

3. Whether the individual disclaiming the benefits or the actual recipient of the benefits under the qualified plan or IRA is taxable under section 691(a) of the Code, relating to income in respect of a decedent, and whether a deduction is allowed under section 691(c) for estate tax.

CONCLUSIONS

1. A disclaimer of qualified plan benefits that satisfies the requirements of state law and section 2518(b) of the Code is neither a prohibited assignment or alienation nor an assignment of income.

2. A disclaimer of benefits from an IRA that satisfies the requirements of state law and section 2518(b) is not an assignment of income. Also, the disclaimer is not contrary to sections 408(a)(4) and 408(b)(1).

3. The actual recipient of the benefits is taxable under section 691(a) and a deduction is allowed under section 691(c).

---

[1] The Secretary of the Treasury has the authority, with certain exceptions not here relevant, to issue "regulations, rulings, opinions, variances, and waivers" under section 206 of ERISA (Employee Retirement Income Security Act of 1974). This authority is a result of section 101(a) of Reorganization Plan No. 4 of 1978, 1979-1 C.B. 480.

FACTS

Situation 1

P, a participant in a qualified plan, died prior to separation from service and prior to [*3] the receipt of any benefits under the plan. As a result, P's spouse, B, became entitled to plan benefits under a qualified preretirement survivor annuity because P had not made an election under section 417 to waive the annuity. However, instead of receiving the benefits, B executed a qualified disclaimer satisfying the requirements of state law and of section 2518(b) of the Code. As a result, the benefits that would otherwise have been payable to B become payable to C, a successor or contingent beneficiary.

Situation 2

P established an individual retirement account and an individual retirement annuity (IRAs). Upon P's death, P's interests in the IRAs became payable to B, P's spouse. However, instead of receiving the benefits, B executed a qualified disclaimer satisfying the requirements of state law and of section 2518(b) of the Code. As a result, the benefits that otherwise would have been paid to B became payable to C, a successor or contingent beneficiary.

ANALYSIS

Section 401(a)(13) provides that a trust shall not constitute a qualified trust unless the plan of which such trust is a part provides that benefits provided [*4] under the plan may not be "assigned or alienated." Similar language is contained in section 206(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1056(d)(1).

Section 1.401(a)-13(c)(1)(ii) provides that the terms "assignment" and "alienation" include any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or bene-

ficiary a right or interest enforceable against the plan in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary.

Section 401(a)(11) provides, in part, that in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, the accrued benefit must generally be provided in the form of a qualified preretirement survivor annuity. However, under section 417(a), the participant may elect to waive the qualified preretirement survivor annuity form of benefit if the participant's spouse consents in writing to the waiver.

Under section 408(a)(4), the interest of an individual in the balance in his individual retirement account must be nonforfeitable. Under section 408(b)(1), an individual [*5] retirement annuity must be a contract that is not transferable by the owner.

If a person makes a "qualified disclaimer" with respect to any interest in property under section 2518, the estate, gift, and generation skipping transfer tax provisions of the Code (subtitle B) apply with respect to the interest as if the interest had never been transferred to the person making the disclaimer.[2] A "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if four specified requirements are satisfied. Section 2518 is silent with respect to the income tax and ERISA consequences of a qualified disclaimer of an interest in a qualified plan or individual retirement account.

Section 2503(f) provides that if any individual waives, before the death of a participant, any survivor benefit, or right to such benefit, under section 401(a)(11) or 417, such waiver shall not be treated as a transfer of property by gift for purposes of chapter 12 of the Code (gift tax). Section 2503(f) is silent with respect [*6] to the

---

[2] For an overview of section 2518, see Gans, Disclaimers, 46 New York University Institute on Federal Taxation 52 (1988).

income tax and ERISA consequences of a waiver or disclaimer, whether before or after the death of the participant.

Sections 401(a)(11) and 417 and the parallel provisions in ERISA (section 205 of ERISA, 29 U.S.C. § 1055) were added by the Retirement Equity Act of 1984 ("REA"), Pub. L. 98-397. In enacting these provisions, Congress wanted to ensure that the participant would not have the exclusive right to determine the form in which benefits are paid under the qualified plan. Congress determined that the spouse ". . . should be involved in making choices with respect to retirement income on which the spouse may also rely. . . ." S. Rep. No. 98-575, p. 12. The policy of giving the spouse an active role, prior to the participant's death, in deciding how retirement benefits are to be paid is entirely consistent with giving the spouse the right to refuse these benefits after the participant's death. There is no evidence that Congress intended to preclude a spouse from disclaiming or renouncing benefits under a qualified plan payable after the participant's death.

Moreover, no inference should be drawn from section 2503(f) that a disclaimer of plan benefits after the participant's [*7] death should receive unfavorable tax treatment simply because Congress provided for favorable gift tax treatment if plan benefits are waived before the participant's death.

At common law, a beneficiary under a will was under no obligation to accept a legacy provided for him by the testator. Newman and Kalter, The Need for Disclaimer Legislation—An Analysis of the Background and Current Law, 28 Tax Lawyer 571 (1975). The beneficiary was permitted to renounce or disclaim the legacy. Detailed rules governing disclaimers are now provided by statute in many states. See also § 2-801 of the Uniform Probate Code. Several state statutes specifically permit a disclaimer of benefits under a pension, profit sharing, or stock bonus plan. For example, see Tex. Prob. Code

Ann. § 37A (Vernon 1987), N.Y. Est. Powers & Trusts Law § 2-1.11 (Consol. 1990), and Ind. Code Ann. § 32-3-2-1 (Burns 1989).

Under the common law, applicable state statutes, and § 2-801(c) of the Uniform Probate Code, a disclaimer operates retroactively, that is, the disclaimer "relates back" to the date of death. See Scott on Trusts, § 36.1 (4th Ed. 1989). The disclaimed property passes as though the disclaimant [*8] predeceased the decedent, and the disclaimed property is regarded as never having vested in the disclaimant. This is consistent with the gift and estate tax treatment provided under section 2518. Because the disclaimant is regarded as never having accepted or received the disclaimed property, the disclaimer is not considered to involve a transfer of property by the disclaimant. See Newman and Kalter, supra, at 571, 572, and 579. (1975). This "no transfer" analysis is reflected in a very early tax case which held that a disclaimer of a legacy was a refusal to accept the property, rather than a transfer of property by the disclaimant in contemplation of death. Brown v. Routzahn, 63 F.2d 914 (6th Cir. 1933). Also, the gift tax regulations in effect prior to the enactment of section 2518 (section 25.2511-1(c)) provided that a disclaimer of property acquired from a decedent did not constitute the making of a gift if the disclaimer was unequivocable, timely, and effective under local law:

Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property [*9] transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance.

Creditors of the disclaimant generally have no claim to the disclaimed property and generally cannot compel the disclaimant to revoke the disclaimer and accept the property. A disclaimer by a trust beneficiary is generally effective against creditors even if the beneficiary is insolvent. See Newman and Kalter, supra, p. 597, Scott on Trusts, supra, § 36.1, and Martin, Perspectives on Federal Disclaimer Legislation, 46 Chi. L. Rev. 316, 319, 320 (1979). The rationale is that the disclaimant is regarded as never having owned the disclaimed property and is not considered to have transferred the property to third parties in contravention of creditors' rights. Thus, a federal district court has held that a son's disclaimer [*10] of a legacy under his mother's will was valid, and the property he renounced was not property "belonging to" the son to which a federal tax lien may attach under section 6321. U.S. v. McCracken, 189 F. Supp. 632 (S.D. Ohio 1960). Also, a disclaimer has been held not to constitute a transfer of property by the debtor under the Bankruptcy Code. Hoecker v. United Bank of Boulder, 476 F.2d 838 (10th Cir. 1973). Similarly, Neilsen v. Cass County Social Services Board, 395 N.W.2d 157 (N.D. 1986), held that a disclaimer of an interest in an estate was not a transfer of property by the disclaimant that would disqualify the disclaimant from receiving future medical assistance from the state department of human services.

State statutes[3] and § 2-801(d)(2) of the Uniform Probate Code provide that a beneficiary may disclaim an interest notwithstanding a spendthrift restriction, although such an interest could not be transferred or alienated if it were accepted by the beneficiary. Prior to the enactment of these statutes, it was unclear whether a beneficiary of a spendthrift trust could disclaim the interest. Scott on Trusts, supra, § 337.7 argues in favor of

---

[3] See, for example, Ill. Rev. Stat. § 2-7 (1989), Fla. Stat. § 732.801 (7) (1989), and Ind. Code Ann. § 32-3-2-12 (Burns 1989).

permitting [*11] disclaimers by beneficiaries of spendthrift trusts notwithstanding certain court decisions to the contrary. Similarly, Newman and Kalter, supra, state (p. 587), "Denial of the right to disclaim a spendthrift interest would seem to result from a confusion between the legal devices of assignment and disclaimer." (emphasis added) Such "confusion" is no longer present in states having statutes that permit a disclaimer of an interest in a spendthrift trust. There is a clear distinction in these states between a transfer or alienation of a spendthrift interest that has been accepted and a disclaimer of the interest prior to acceptance.

Given the Congressional purpose in ERISA of establishing a nation-wide scheme for regulating employee benefit plans and protecting the interests of plan participants, a uniform federal standard necessarily controls the interpretation of the phrase "assignment or alienation" as used in section 401(a)(13) of the Code and section 206(d) of ERISA. Nevertheless, because the rules governing disclaimers under state law [*12] and section 2518 of the Code are generally consistent with the Congressional purpose underlying sections 401(a)(13) and 206(d), those rules are relevant to the application of the uniform federal standard. We therefore conclude that a disclaimer of benefits under a qualified plan does not constitute a prohibited "assignment or alienation" of plan benefits if the disclaimer satisfies (1) the four requirements of section 2518(b) and (2) the requirements of applicable state law.

No opinion is expressed as to whether a transfer of plan benefits that is not a qualified disclaimer under section 2518(b) is (or may be) a prohibited assignment or alienation. This includes a transfer that fails to qualify under section 2518(b) but which is "treated as" a qualified disclaimer under section 2518(c)(3).

Nor is any opinion expressed as to whether a transfer of plan benefits that was intended to qualify as a disclaimer under state law, but which failed to qualify as

such, is (or may be) a prohibited assignment or alienation.

Situation 1

Consistent with the foregoing, we have concluded in Situation 1 that B's disclaimer of B's interest in the qualified plan does not constitute a transfer [*13] or alienation of the interest in the qualified plan contrary to section 401(a)(13) of the Code and section 206(d) of ERISA. C is regarded as having acquired an interest in the plan from P, not from B.

Moreover, we have concluded in Situation 1 that the benefits under the qualified plan are taxable to C, rather than B. The effect of the disclaimer is that B never became a beneficiary of the qualified plan because the disclaimer "relates back" to the date of P's death. Under section 402(a) of the Code, benefits under a qualified plan are taxable upon actual distribution to the beneficiary. B is not taxable under section 402(a) simply because B would have had a right to receive plan benefits had B not disclaimed. B never became a beneficiary of the qualified plan and no amounts were actually paid or distributed to B. Given the disclaimer, B is deemed never to have been a beneficiary of the qualified plan, and therefore is not taxable under section 402(a). C is taxable on amounts actually distributed from the plan.

Situation 2

The distributee or payee of an individual retirement account or annuity is generally taxable [*14] only on amounts "actually paid or distributed." Section 1.408-4 (a)(1) of the regulations. In Situation 2, C, rather than B, is the payee or distributee, and no amount was actually paid or distributed to B. Therefore, C, rather than B, should be taxed on the benefits from the IRAs.

Moreover, because the effect of the disclaimer is that B never became a beneficiary of the individual retirement

account or annuity, the distribution to C does not violate either section 408(a)(4) or section 408(b)(1) of the Code. B never acquired an interest in the individual retirement account. Therefore, there could be no forfeiture of an interest in the account contrary to section 408(a)(4). Similarly, B never became the owner of the individual retirement annuity. Therefore, there could be no transfer of the annuity by the owner contrary to section 408(b)(1).

Situations 1 and 2

In addition, in Situations 1 and 2, the amounts payable to C constitute income in respect of a decedent under section 691 of the Code. See Rev. Rul. 54-601, 1954-2 C.B. 197, cited with approval in Hess v. Commissioner, 271 F.2d 104 (3d Cir. 1959, rev'g, 31 [*15] T.C. 165 (1958). Because the disclaimer "relates back" to the date of P's death, C, rather than B, is considered "the person who, by reason of the death of the decedent acquires the right to receive . . ." the income in respect of the decedent. C will be entitled to a deduction under section 691(c) for estate tax attributable to the inclusion of the preretirement survivor annuity, or IRA benefits, in P's estate.

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SUPREME COURT OF THE UNITED STATES

No. 92-1546

UNITED STATES, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ORDER ALLOWING CERTIORARI

Filed June 14, 1993

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

June 14, 1993

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No. 92-1546

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the federal gift tax applies to the disclaimer of a remainder interest in a trust when the trust was created before the federal gift tax was enacted.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1546

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-28a) is reported at 981 F.2d 991. The panel opinion of the court of appeals (Pet. App. 29a-49a) is reported at 936 F.2d 343. The memorandum opinion of the district court (Pet. App. 50a-59a) is unofficially reported at 89-2 U.S.T.C. (CCH) ¶ 13,818.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1992. The petition was filed on March 23, 1993, and was granted on June 14, 1993. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

1. The relevant portions of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), are set forth at Pet. App. 60a. The relevant portions of Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), are set forth at Pet. App. 60a-63a.

2. Section 25.2518-2(c)(3) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2518-2(c)(3), provides, in relevant part:

> * * * With respect to inter vivos transfers, a taxable transfer occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift. Thus, gifts qualifying for the gift tax annual exclusion under section 2503(b) are regarded as taxable transfers for this purpose. With respect to transfers made by a decedent at death or transfers which become irrevocable at death, a taxable transfer occurs upon the date of the decedent's death. * * *

STATEMENT

This case concerns the gift tax liability of Sally Ordway Irvine that stems from her disclaimer, in 1979, of a portion of her remainder interest in the Lucius P. Ordway Trust.

1. In 1917, Mrs. Irvine's grandfather, Lucius P. Ordway, established an irrevocable inter vivos family trust, into which he contributed substantial assets.[1]

---

[1] Congress enacted the first federal estate tax in 1916. See Revenue Act of 1916, ch. 463, §§ 200-212, 39 Stat. 756, 777. After enactment of the federal estate tax, but before enactment of the federal gift tax, it was possible for wealthy

The income of the trust was to be paid to Mr. Ordway's wife and their five children during their lives. The trust also provided that, if any Ordway child died before the trust was terminated, that child's issue and the child's surviving spouse (if not remarried) would receive the child's share of the trust income (Pet. App. 2a-3a). Upon the death of the last to survive of Mrs. Ordway and the Ordway children, the trust was to terminate. The corpus of the trust was then to be distributed to Mr. Ordway's grandchildren in equal shares. If any of the Ordway grandchildren died with issue prior to the termination of the trust, that grandchild's share of the principal was to be distributed to his or her surviving issue, per stirpes (*ibid.*).

Mrs. Irvine became aware of her remainder interest in the trust when she reached the age of majority in 1931 (Pet. App. 3a). After her father died in 1966, she became entitled to receive (and did receive) a share of the trust income each year (Pet. App. 2a-3a; J.A. 64). Between 1931 and 1979, she took no steps to disclaim either her income or remainder interests in the trust.

On June 27, 1979, the last of Lucius Ordway's children died, and the trust terminated. Twelve Ordway grandchildren, including Mrs. Irvine, were living at that time. A thirteenth grandchild had died with issue. The trust's corpus was therefore divided into thirteen shares. On August 21, 1979, Mrs. Irvine

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individuals to employ inter vivos family trusts to transfer assets to their spouses or descendants without incurring any federal tax liability. An important objective of the federal gift tax was to curb evasion of the estate tax through use of such pretestamentary gifts. See *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939).

filed a disclaimer of five-sixteenths of her interest in the trust corpus. That partial disclaimer was valid under Minnesota law. See Minn. Stat. Ann. § 501.221 (West 1988). As a result of her disclaimer, each of Mrs. Irvine's five children received one-sixteenth of her share of the distributed trust principal (Pet. App. 3a, 52a).

Mrs. Irvine filed a federal gift tax return for the third quarter of 1979. That return disclosed that she had disclaimed a portion of her interest in the Ordway Trust, but took the position that the disclaimer did not effect a transfer of property to which the gift tax applied. Upon audit, the Commissioner of Internal Revenue determined (i) that the disclaimer constituted an indirect "transfer of property by gift" within the meaning of Sections 2501(a)(1) and 2511(a) of the Internal Revenue Code, 26 U.S.C. 2501(a)(1), 2511(a), and (ii) that the disclaimer was not excepted from tax under Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, 26 C.F.R. 25.2511-1(c), because the disclaimer had not been made "within a reasonable time" (*ibid.*) after Mrs. Irvine became aware of her interest in the trust. Mrs. Irvine then filed an amended gift tax return on which she reported the disclaimer as a taxable gift. Along with her amended return, she paid the federal gift tax shown to be due of $7,486,671. She thereafter paid an additional $2,086,627 in accrued interest on the deficiency (Pet. App. 4a, 31a).

Meanwhile, in August 1980, Mrs. Levine made a gift that was unrelated to her 1979 disclaimer. She filed a gift tax return for the third quarter of 1980, on which she claimed that the tax due on that gift was offset by the unified credit available to her under 26 U.S.C. 2505. The Commissioner notified Mrs.

Irvine, however, that the adjustments required for her amended 1979 third-quarter gift tax return—which reported her partial disclaimer as a gift—reduced the amount of unified credit available to her. As a result, she owed an additional $44,035 in gift taxes for the gift made in 1980. Mrs. Irvine paid the additional tax owed for 1980, plus $10,959 in accrued interest (Pet. App. 31a-32a).

Mrs. Irvine thereafter filed a timely claim for refund of the gift tax and interest paid for the third quarter of 1979 and the third quarter of 1980. The claim for refund was denied by the Internal Revenue Service (Pet. App. 4a, 32a).

2. After Mrs. Irvine's death in 1987, respondents —who are the personal representatives of her estate —filed this action seeking a refund of the gift tax and interest paid. On cross-motions for summary judgment, the district court held that the tax was improperly assessed and ordered a refund of tax and interest in the amount of $22,748,250 (Pet. App. 4a, 32a-33a).

The district court acknowledged that, in *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), this Court held that "a disclaimer [is] a 'transfer' within the scope of the gift tax provisions" (*id.* at 318). The district court concluded, however, that "[t]he fundamental distinction between *Jewett* and the present case is that the original transfer by Lucius Ordway occurred in 1917, well before the Gift Tax Act was passed in 1932" (Pet. App. 56a). The district court noted that, "[a]s originally enacted, the 1932 Gift Tax Act clearly states that '[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act'" (Pet. App. 56a-57a (quoting Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245)). The

court therefore concluded that the gift tax could not apply to the disclaimer in this case (Pet. App. 57a).

In reaching its conclusion, the district court noted that another district court had "reached the same conclusion on virtually identical facts" in a case involving a partial disclaimer by one of Mrs. Irvine's brothers of his remainder interest in the Ordway Trust (Pet. App. 58a, citing *Ordway* v. *United States*, 89-1 U.S.T.C. (CCH) ¶ 13,802 (S.D. Fla. Mar. 13, 1989)). The court stated that it found the reasoning of the "indistinguishable" *Ordway* decision to be "compelling" (Pet. App. 58a).

3. A divided panel of the court of appeals reversed (Pet. App. 29a-49a). Judge McMillian, writing for the court, noted that the Eleventh Circuit, in *Ordway* v. *United States*, 908 F.2d 890 (1990), cert. denied, 111 S. Ct. 2916 (1991), had reversed the decision on which the district court had relied. Judge McMillian stated that "[w]e agree with the Eleventh Circuit that the fact that the creation of the Ordway trust in 1917 pre-dated the enactment of the federal gift tax in 1932 is not dispositive" (Pet. App. 35a). He concluded that the gift tax properly applies to Mrs. Irvine's disclaimer because here, "as in *Ordway*, the government does not seek to tax the transfers that created the Ordway trust in 1917; it seeks to tax Mrs. Irvine's partial disclaimer in 1979 of her remainder interest in the trust, an indirect transfer which occurred well after * * * the enactment of the gift tax in 1932" (*id.* at 36a).

Judge McMillian noted that "[t]he scope of [the gift] tax is broad, applying 'whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible' " (Pet. App. 34a, quoting

McDonald v. *Commissioner*, 853 F.2d 1494, 1499 (8th Cir. 1988), cert. denied, 490 U.S. 1005 (1989)). He concluded that here, as in *Jewett*, the disclaimer constitutes "an indirect gift to a successor in interest subject to federal gift tax liability" (Pet. App. 35a, quoting 455 U.S. at 306).

Judge McMillian further concluded that Mrs. Irvine had failed to come within the regulatory safe habor for disclaimers that occur "within a reasonable time" after the taxpayer acquires knowledge of the interest being disclaimed (Pet. App. 39a-40a). This safe-harbor provision, Section 25.2511-1(c)(2) of the gift tax regulations, states in pertinent part as follows (26 C.F.R. 25.2511-1(c)(2) (emphasis supplied)):

> In the case of taxable transfers creating an interest in the person disclaiming made before January 1, 1977, * * * a refusal to accept ownership does *not* constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.

This regulatory safe harbor applies only to disclaimers from "taxable transfers" (26 C.F.R. 25.2511-1(c)(2)). Respondents asserted "that the creation of the Ordway trust could not have been a 'taxable transfer' because * * * there was no gift tax when the * * * trust was created in 1917" (Pet. App. 37a). The term "taxable transfer" is defined in the regulations, however, to include any "completed gift for Federal gift tax purposes regardless of whether a gift tax [was] imposed on the completed gift" (*ibid.*, quoting 26 C.F.R. 25.2518-2(c)(3)). Since the irrevocable transfer of assets to the trust in 1917 represented a completed gift by Mr. Ordway, it was a "taxable transfer" within the meaning of the regula-

tion even though a tax had not been imposed on that gift. Judge McMillian concluded that the establishment of the Ordway Trust represented a "taxable transfer" under the regulation and that the regulation is therefore *potentially* available as a mechanism to permit a timely disclaimer by Mrs. Irvine to escape tax (Pet. App. 37a).

In *Jewett*, however, this Court held that the "reasonable time" for a disclaimer to be made runs from the time "when the disclaimed interest was created and not later when that interest vested" (Pet. App. 39a, citing 455 U.S. at 312, 318-319). Since Mrs. Irvine disclaimed her remainder interest in 1979, which was "some 48 years" after she first became aware of her interest, Judge McMillian stated that the disclaimer "was clearly too late" (Pet. App. 39a).[2]

Senior Judge Bright filed a concurring opinion. In his view, the term "taxable transfer," as used in Regulations Section 25.2511-1(c)(2), "merely describes a class of interests to which the regulation applies based upon the nature of the transactions creating them. It is not meant to literally refer solely to transfers in which gift taxes were assessed" (Pet. App. 43a). Judge Bright concluded that "Mrs. Irvine's remainder interest was subject to the federal gift tax unless her disclaimer * * * was timely" (*ibid.*). He stated that "the time period for Mrs. Irvine to dis-

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[2] The panel noted that respondents had not contended that *Jewett*, which was decided in 1982, should not be applied "retroactively" to this case (Pet. App. 41a). The panel therefore declined to consider that issue (*ibid.*). Judge McMillian noted, however, that the Court had found no retroactivity problem in *Jewett* because the taxpayer "never had such a right" to disclaim his interest free of the gift tax (*id.* at 41a n.2, quoting 455 U.S. at 317).

claim her interest began to run, at the latest, in 1931 when she was aware of her remainder interest and had reached the age of majority" (*ibid.*). He concluded that "Mrs. Irvine's partial disclaimer, almost 50 years later, was not made within a reasonable time" (*id.* at 43a-44a).

Judge Bowman dissented. He stated that Section 25.2511-1(c)(2) of the regulations "reflects the unassailable premise that a disclaimer is not subject to the federal gift tax unless the transfer creating the interest disclaimed was a 'taxable transfer' for purposes of the Gift Tax Act" (Pet. App. 44a). "Because the contingent remainder interest that Mrs. Irvine disclaimed in 1979 was created in 1917" (*id.* at 48a), Judge Bowman reasoned that "it never was subject to the federal gift tax and therefore was never a 'taxable transfer' for federal gift tax purposes" (*ibid.*).

4. On respondents' petition for rehearing with suggestion for rehearing en banc, the court of appeals vacated the panel decision and affirmed the district court by a 7-4 vote (Pet. App. 1a-28a). The majority stated that "*Jewett* deals with the timeliness of the disclaimer of an interest created *after* the effective date of the federal gift tax and thus does not speak to the precise issue we confront here" (*id.* at 6a n.2). The majority noted that Section 25.2511-1(c)(2) of the regulations refers to "*taxable transfers* creating an interest in the person disclaiming made before January 1, 1977" (Pet. App. 5a, quoting 26 C.F.R. 25.2511-1(c)(2)). In the majority's view, that regulation "reflects the fundamental principle that a disclaimer should not be subject to the federal gift tax unless the transfer creating the interest dis-

claimed was itself a 'taxable transfer' " (Pet. App. 5a-6a). The majority reasoned that, "absent this limitation, the gift tax would be imposed on a donee's refusal to accept a gift that never was subject to the tax in the first place, an anomaly that Congress, given its clear intent * * * that the gift tax should not have any retroactive application, did not ordain" (*id.* at 6a). The majority held that the creation of the trust in 1917, 15 years before the enactment of the gift tax, did not constitute a "taxable transfer" within the meaning of the regulation, and that, as a result, the regulation's timeliness requirement did not apply (*id.* at 6a-7a).[3]

The majority then concluded that, because Section 25.2511-1(c)(2) of the regulations is inapplicable, "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (Pet. App. 10a). Noting that Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), the majority concluded that "this disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*). The majority acknowledged (*id.* at 7a-8a) that its holding was in direct conflict with the Eleventh Circuit's decision in *Ordway* v. *United States*, *supra*, which upheld application of the gift tax to a disclaimer made by another beneficiary of the same trust. Pet. App. 8a.

Judge Loken filed a concurring opinion. He wrote separately "to address whether the regulation in ef-

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[3] The majority stated that "[w]e have difficulty in understanding how there can be, in the language of section 25.2518-2(c)(3), 'a completed gift for Federal gift tax purposes' unless a federal gift tax is in force when the gift is made" (Pet. App. 8a-9a, quoting 26 C.F.R. 25.2518-2(c)(3)).

fect when Mrs. Irvine made her disclaimer applies to this case" (Pet. App. 12a). Judge Loken noted that "[the regulation as initially promulgated in 1958 did not contain the current regulation's reference to 'taxable transfers' " (*ibid.*). In his view, "this prior version of the regulation does not apply in this case because it only applied to 'property transferred from a decedent,' whereas the interest Mrs. Irvine disclaimed was created by an inter vivos trust" (*id.* at 13a).

Judge McMillian filed a dissenting opinion in which Senior Judges Lay and Bright and Judge Gibson joined. In their view, "the majority opinion's interpretation of 'taxable transfer' as a transfer made after the enactment of the federal gift tax is too narrow" (Pet. App. 17a). They would have followed the Eleventh Circuit's decision in *Ordway* and held (i) that the "reasonable time" within which a taxpayer may avoid the gift tax by refusing to accept ownership of property is governed by Section 25.2511-1(c) of the regulations, and (ii) that the term "taxable transfer" as used in that regulation includes " 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax" (Pet. App. 17a-18a, quoting *Ordway* v. *United States*, 908 F.2d at 895). The dissent concluded that "whether or not the interest created was established before the enactment of the federal gift tax is irrelevant; the key is whether the interest was created by a 'taxable transfer,' that is, a completed gift" (Pet. App. 20a).

SUMMARY OF ARGUMENT

I

The federal gift tax reaches all gratuitous transfers of property, whether direct or indirect, and no matter how "conceptual or contingent" the property interest may be. *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943). In *Jewett* v. *Commissioner*, the Court held that a disclaimer of a remainder interest in a trust, which causes the interest to pass to the next qualified person designated in the trust instrument, represents an indirect transfer of a property interest to which the gift tax "unquestionably" applies. 455 U.S. at 310. The Court's holding in *Jewett* governs this case.

The fact that the remainder interest disclaimed in 1979 by Mrs. Irvine was created in 1917—before the gift tax was enacted in 1932—does not alter the fact that her disclaimer is subject to tax. The gift tax applies to the "transfer of property by gift" (26 U.S.C. 2501(a)(1)). Many property rights currently in existence were created before 1932. So long as the "transfer" that is the subject of the tax occurred after the tax was enacted in 1932, it is irrelevant when the property right being transferred was created. It is the date when the taxpayer transferred her remainder interest by disclaimer, not the date when the interest was created, that determines the applicability of the gift tax. Because her disclaimer occurred in 1979—long after the gift tax was enacted—it is subject to tax.

II

The Treasury Regulations on Gift Tax establish a safe harbor under which a disclaimer is *not* subject

to the gift tax if two conditions are met: (i) the disclaimer must be effective under local law; and (ii) the disclaimer must be made "within a reasonable time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1(c)(2)). This Court held in *Jewett* v. *Commissioner* that the "reasonable time" within which the disclaimer must be made runs from the time that the interest being disclaimed was created, rather than from the time the interest vested and became possessory. 455 U.S. at 310, 312. In *Jewett*, a disclaimer made 33 years after the interest was created was held to be untimely under the regulation. *Id.* at 306, 318-319. Mrs. Irvine's delay of 48 years was even greater than the delay found untimely in *Jewett*. Her 1979 disclaimer is therefore not within the regulatory safe harbor and remains subject to tax.

The court of appeals erred in concluding that the safe-harbor provision is inapplicable to this case because the regulation applies only to disclaimers following "taxable transfers" (26 C.F.R. 25.2511-1(c)(2)). The court reasoned that the 1917 transfer creating the trust in this case preceded the gift tax and was thus not a "taxable transfer." The term "taxable transfer" is defined by the regulations, however, to mean simply a completed gift, "regardless of whether a gift tax is imposed on the completed gift" (26 C.F.R. 25.2518-2(c)(3)). The irrevocable transfer that created the trust in 1917 was a completed gift (*Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 43-44 (1939)) and thus a "taxable transfer" under the definition employed in the regulation. The taxpayer's failure to disclaim her interest in the trust within a "reasonable time," however, bars her reliance on this regulatory safe-harbor provision.

The court of appeals also erred in concluding that, if the safe-harbor provision is inapplicable to the taxpayer's disclaimer, then the disclaimer escapes tax simply because it was valid under state law. An invalid disclaimer, of course, would not effect a "transfer" of property, by gift or otherwise. A valid disclaimer that fails to qualify under the safe-harbor provision, however, is taxable under the general provisions of the regulation and the statute. In *Jewett*, this Court unequivocally rejected the contention that state law governs the taxability of disclaimers under the federal gift tax. 455 U.S. at 316. A disclaimer that is valid under state law, but that fails to satisfy the "reasonable time' requirement of the federal regulation, is subject to the federal tax. *Ibid.*

ARGUMENT

I. THE FEDERAL GIFT TAX APPLIES TO MRS. IRVINE'S DISCLAIMER OF HER REMAINDER INTEREST IN THE ORDWAY TRUST

A. The Disclaimer Of A Remainder Interest In A Trust Represents A Transfer Of Property To Which The Federal Gift Tax Applies

Sections 2501(a) and 2511(a) of the Internal Revenue Code impose a tax "on the transfer of property by gift," whether the transfer "is in trust or otherwise," and whether the gift is "direct or indirect" (26 U.S.C. 2501(a), 2511(a); see 26 C.F.R. 25.2511-1(c)(1)). By taxing gifts, Congress sought to discourage circumvention of the estate tax by the use of lifetime transfers that deplete taxable estates. See, *e.g.*, *Jewett* v. *Commissioner*, 455 U.S. at 310; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 44 (1939); note 1, *supra*. To achieve that objective,

Congress designed "the gift tax statute to reach all gratuitous transfers of any valuable interest in property" (*Dickman* v. *Commissioner*, 465 U.S. 330, 334 (1984)). See H.R. Rep. No. 708, 72d Cong., 1st Sess. 27-28 (1932); S. Rep. No. 665, 72d Cong., 1st Sess. 39 (1932). The statute is broadly written to reach gratuitous transfers of all forms of property and property interests, "however conceptual or contingent" those interests may be. *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943).

This case involves the transfer of property by means of a disclaimer. By refusing to accept ownership of property, the disclaimant causes the property to pass to the next qualified person designated in a governing instrument such as a will or deed of trust. In *Jewett* v. *Commissioner*, this Court held that such a disclaimer indirectly effects a "transfer of property by gift" (26 U.S.C. 2501(a)) and is therefore subject to the federal gift tax. 455 U.S. at 309-310. The Court noted that the practical effect of a disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (*id.* at 310). The Court held that, in view of its "expansive" scope, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust" (*ibid.*).[4]

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[4] Three Justices dissented from this holding in *Jewett*, noting that the disclaimant in that case had never enjoyed present ownership of either the capital or the income of the trust. 455 U.S. at 324 (Blackmun, J., dissenting). The majority in *Jewett* observed, however, that the interest disclaimed need not be possessory to represent an interest in "property" under

The Court's holding in *Jewett* applies directly to the 1979 disclaimer by Mrs. Irvine of her remainder interest in the Ordway Trust. The determination in *Jewett* that a disclaimer is a transfer subject to the gift tax disposes of that same issue in this case. See also note 4, *supra*.

B. The Fact That The Ordway Trust Was Created Before The Federal Gift Tax Was Enacted Is Not Relevant

The court of appeals correctly noted that, in enacting the federal gift tax, Congress specified that "'[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932.]' Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169, 245" (Pet. App. 7a).[5] The court erred,

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the gift tax statute. The transfers of "property" to which the gift tax applies include transfers of "contingent," as well as possessory, interests. See 455 U.S. at 309-310, citing *Smith* v. *Shaughnessy*, 318 U.S. at 180.

Moreover, the facts of the present case reflect that Mrs. Irvine had received income from the Ordway Trust for many years before she partially disclaimed her interest in the trust capital upon distribution. See J.A. 64. Under the view expressed by the dissent in *Jewett*, the fact that Mrs. Irvine had long enjoyed the present right to receive this income from the Trust would represent a "vital fact that distinguishes the case" and justify application of the federal gift tax to her disclaimer. 455 U.S. at 327. Under the reasoning of both the majority and the dissent in *Jewett*, the federal gift tax thus properly applies to Mrs. Irvine's 1979 disclaimer of her interest in the Ordway Trust.

[5] Congress adopted this requirement to comply with this Court's decisions in *Untermyer* v. *Anderson*, 276 U.S. 440 (1928), and *Nichols* v. *Coolidge*, 274 U.S. 531 (1927), which had held various retroactive features of the 1924 gift tax to

however, in suggesting that, because the Ordway Trust was created in 1917, before the gift tax was enacted, taxing Mrs. Irvine's 1979 disclaimer of her interest in the trust would "apply the tax retroactively" (*ibid.*). The court similarly erred in suggesting (*id.* at 6a n.2, 7a) that this Court's decision in *Jewett*—which concerned the disclaimer of an interest in a trust that was created in 1939, *after* the gift tax was enacted—is distinguishable on that basis.

The gift tax applies to the "transfer of property by gift" (26 U.S.C. 2501(a)(1)). Many property rights currently in existence were created before 1932. So long as the "transfer" that is the subject of the tax occurred after 1932, it is irrelevant when the property right being transferred was created. See Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245. The court of appeals simply misperceived the transaction that the government seeks to tax in this case. It is Mrs. Irvine's 1979 transfer by disclaimer, not her grandfather's 1917 transfer in trust, upon which the gift tax is laid. No gift tax has been imposed on Lucius Ordway's original transfer in trust. Mrs. Irvine's partial disclaimer of her remainder interest

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be unconstitutional under the Due Process Clause. The continuing force of the *Untermyer* and *Nichols* decisions has occasioned much speculation. See, *e.g.*, *United States* v. *Hemme*, 476 U.S. 558, 568 (1986); *Estate of Ceppi* v. *Commissioner*, 698 F.2d 17, 21 (1st Cir.), cert. denied, 462 U.S. 1120 (1983); *Sidney* v. *Commissioner*, 273 F.2d 928, 932 (2d Cir. 1960) (Friendly, J.) (questioning whether "*Untermyer* remains authority at all"). Because the 1932 gift tax incorporated a statutory non-retroactivity requirement, however, the scope of any constitutional restriction on retroactive application of the statute is not at issue.

in 1979, however, is a separate and distinct transaction.

Mrs. Irvine's remainder interest in the Ordway Trust was a valuable property interest, even though it was subject to contingencies and did not become possessory until immediately before she partially disclaimed it in 1979. See *Jewett* v. *Commissioner*, 455 U.S. at 318-319; *Commissioner* v. *Procter*, 142 F.2d 824, 826-827 (4th Cir.), cert. denied, 323 U.S. 756 (1944). After the death of her father in 1966, Mrs. Irvine became entitled to receive a share of the income of the trust each year. Moreover, for 48 years, Mrs. Irvine possessed the power to decide the ultimate disposition of her remainder share of the corpus of the trust, and she relinquished that power only after her interest became possessory in 1979.[6] It is precisely upon the relinquishment of her power to control the disposition of this property that the gift tax is laid. See, *e.g.*, *Estate of Sanford* v. *Commissioner*, 308 U.S. at 43; *Burnet* v. *Guggenheim*, 288 U.S. 280, 285-287 (1933). As this Court stated in *Jewett*, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust," for the effect of the disclaimer is "to reduce the expected size of [the taxpayer's] taxable estate and to confer a gratuitous benefit upon the natural objects of his bounty" (455 U.S. at 310).

It is thus the date that the interest was transferred by disclaimer, not the date that the interest was created, that is relevant for application of the gift tax. The Court emphasized this same distinction in

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[6] The trust did not preclude Mrs. Irvine from receiving her share of the corpus and, if she did not consume it, leaving it by will to any person or entity of her choosing.

United States v. *Jacobs*, 306 U.S. 363 (1939). In *Jacobs*, a joint tenancy for certain property had been created between husband and wife in 1909, before the first estate tax was enacted in 1916. See note 1, *supra*. The husband died in 1924. Because he had furnished the consideration for the property, the government sought to include the full value of the joint property in the husband's gross estate. The estate argued that this represented an improper "retroactive" application of the estate tax to an interest created before the tax was enacted. The Court rejected that contention, concluding that "the tax was not levied on the 1909 transfer and was not retroactive" (*id.* at 366). The Court noted that the estate tax was imposed on the "change in ownership" that occurred in 1924, an event that transpired *after* the estate tax was enacted. *Id.* at 367. The Court held that (*ibid.*):

> the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax.

See also *Fernandez* v. *Wiener*, 326 U.S. 340, 355 (1945) ("a tax upon the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process"); *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 345 (1929) (a tax is not retroactive when it applies to a transfer that "followed the passage of the statute"); *Chase Nat'l Bank* v. *United States*, 278 U.S. 327, 335-336 (1929); *Gladney* v. *Commissioner*, 745 F.2d 955, 964 (5th Cir. 1984), cert. denied, 474 U.S. 923 (1985).[7]

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[7] The majority erred in relying (Pet. App. 9a-10a) on *Commissioner* v. *Copley's Estate*, 194 F.2d 364 (7th Cir. 1952). In *Copley's Estate*, a couple entered into an antenuptial agree-

As the dissenting judges correctly noted in this case, "the majority opinion seeks to inject the issue of retroactivity into this case where none actually exists" (Pet. App. 22a-23a n.2). Here, as in *Jacobs*, the post-enactment transfer by disclaimer of Mrs. Irvine's interest in the pre-enactment trust represented "a change in the nature of ownership of property [that] was designated by Congress as an appropriate occasion for the imposition of a tax" (306 U.S. at 371).

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ment in 1931 under which the prospective husband agreed to pay $1 million to his future wife upon demand at any time after their marriage. In return, she surrendered any other marital property rights to which she may have been entitled. In fulfillment of this pledge, the husband transferred $500,000 in securities to his wife in 1936 and the same amount in 1944. Although such a transfer of property in return for the surrender of marital property rights had been held to be a gratuitous transfer (see *Commissioner* v. *Wemyss*, 324 U.S. 303, 306-307 (1945)), the Seventh Circuit held that the transfers involved in *Copley's Estate* were not subject to the gift tax because the relevant transaction preceded enactment of the tax. In the Seventh Circuit's view, in 1936 and 1944, the husband was simply discharging an obligation that arose under the 1931 agreement. The court concluded that, in these circumstances, subjecting the transfers to the gift tax would have amounted to a retroactive imposition of the tax. 194 F.2d at 367. By contrast, in the present case, it is the disclaimer made by Mrs. Irvine in 1979—not the distribution of the trust assets upon termination of the trust—that is being subjected to tax.

The facts of *Copley's Estate* would parallel the facts of the present case only if *Copley's Estate* involved a gratuitous transfer *by the wife after 1932* of her right to receive the property from her husband. In that hypothetical situation, as here, the gratuitous transfer of an interest in property after 1932 would plainly be subject to the gift tax.

II. MRS. IRVINE'S 1979 DISCLAIMER IS NOT PROTECTED BY THE REGULATORY SAFE HARBOR FOR DISCLAIMERS MADE WITHIN A "REASONABLE TIME" OF THE ESTABLISHMENT OF THE TRUST

1. The Treasury Regulations on Gift Tax implement the broad scope of the federal tax by providing that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1(c)(1)). Since the promulgation of these regulations in 1958, however, the Commissioner of Internal Revenue has recognized a narrow exception, or safe harbor, to this general rule of taxability. See 26 C.F.R. 25.2511-1(c) (1958); Pet. App. 60a-61a. Both originally and in their current form,[8] the regulations provide that a refusal to accept ownership of property does not constitute a gift if two conditions are met. First, the refusal must be effective under local law. Second, the refusal must be made "within a reason-

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[8] Section 25.2511-1(c)(2) of the regulations, as amended in 1986, supersedes the 1958 version of that regulation and is controlling in this case. Treasury Regulations and rulings are retroactive to the effective date of the statute to which they relate, unless retroactive application is limited by the Secretary or constitutes an abuse of discretion. See *Automobile Club* v. *Commissioner*, 353 U.S. 180, 184 (1957); *Redhouse* v. *Commissioner*, 728 F.2d 1249, 1251 (9th Cir.), cert. denied, 469 U.S. 1034 (1984); *Manocchio* v. *Commissioner*, 710 F.2d 1400, 1403 (9th Cir. 1983). See also 26 U.S.C. 7805(b) (the Secretary "may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect").

able time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1(c)(2)).[9]

This Court held in *Jewett* that the "reasonable time" within which the disclaimer must be made runs from the time that the interest being disclaimed was created, rather than from the time that the interest vested and became possessory. 455 U.S. at 310.[10] In *Jewett*, the trust was established in 1939 but the taxpayer did not disclaim his contingent remainder interest until 1972. The Court held that the disclaimer —filed 33 years after the interest was created—was untimely. *Id.* at 306, 318-319.

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[9] The safe-harbor regulation creates an exception from the gift tax that does not exist on the face of the statute. In *Jewett*, the Court rejected the taxpayer's argument that the regulation affording a "reasonable time" for a disclaimer to escape tax could not "retroactively" be applied to interests that had been created before the regulation was adopted. The Court stated that the taxpayer's argument "is based on an assumption that petitioner had a 'right' to renounce the interest without tax consequences that was 'taken away' by the 1958 Regulation. Petitioner never had such a right." 455 U.S. at 317.

[10] As this Court explained in *Jewett*, the "reasonable time" requirement reflects the concern that a delayed renunciation, although perhaps timely as a matter of state law, is unacceptable for federal tax purposes because of the role delay may play in personal estate planning. 455 U.S. at 316 n.17. The Court noted that "the passage of time is crucial to the scheme of the gift tax." *Ibid.*, quoting *Jewett* v. *Commissioner*, 70 T.C. 430, 431 (1978). Time allows the designated beneficiary to exercise control over the disposition of an interest while evaluating whether to retain the property or allow it to pass to the next generation. The regulation, in this manner, makes an appropriate distinction between timely disclaimers that generate no gift tax liability and untimely disclaimers that are subject to tax.

In this case, Mrs. Irvine's remainder interest was created upon Lucius Ordway's original transfer in trust in 1917. She learned of her interest in the trust by the time she reached the age of majority in 1931. Mrs. Irvine became entitled to a share of the income from the Ordway trust after her father's death on January 19, 1966, and her share increased after the death of her mother on August 27, 1974 (J.A. 64). Mrs. Irvine did not renounce her interest in the trust corpus, however, until the trust was terminated in 1979. At that time, she was 68 years old, and had known of her remainder interest in the trust for at least 48 years.[11] As was true in *Jewett*, the practical effect of Mrs. Irvine's disclaimer was "to reduce the expected size of [her] taxable estate and to confer a gratuitous benefit upon the natural objects of [her] bounty" (455 U.S. at 310). Here, as in *Jewett*, Mrs. Irvine's 1979 disclaimer was not made within a "reasonable time" (455 U.S. at 318-319), therefore does not qualify under the regulatory safe-harbor provision and thus remains subject to gift tax. See also note 4, *supra*.

2. The court of appeals concluded, however, that Section 25.2511-1(c)(2) of the gift tax regulations does not apply in the circumstances of this case. Under the regulation, a disclaimer is *not* subject to the gift tax if it is made within a "reasonable time" after the "taxable transfer" that created the interest (26 C.F.R. 25.2511-1(c)(2)). See note 8, *supra*. The court of appeals concluded that the creation of

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[11] Due to this lengthy delay, she was in a far better position to determine whether she needed the property for her own use or could afford to transfer it directly to the next generation, thereby saving estate taxes at her death. See *Jewett* v. *Commissioner*, 455 U.S. at 316 n.17.

the trust in 1917, fifteen years before the gift tax was enacted, did not constitute a "taxable transfer" within the meaning of the regulation and that, as a result, the regulation's "reasonable time" provision does not apply in this case (Pet. App. 6a-7a).

a. As the Eleventh Circuit correctly recognized in *Ordway* v. *United States*, 908 F.2d at 895, however, the term "taxable transfer" in the amended regulation merely refers to a transfer that is a completed gift, whether or not a gift tax was actually imposed.[12]

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[12] The preexisting disclaimer regulation (26 C.F.R. 25.2511-1(c) (1958)) was amended in 1986. See note 8, *supra*. The amendment was designed to conform the regulations under Section 2511 to the new regulations being promulgated at the same time under Section 2518 of the Code. See 45 Fed. Reg. 48,922 (July 22, 1980).

Section 2518 of the Internal Revenue Code, which was enacted in 1976, prospectively eliminated the "reasonable time" requirement of the regulation and established uniform rules applicable to the timeliness of disclaimers. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(e)(2), 90 Stat. 1896. Under the new statute, to avoid tax, a "qualified disclaimer" must be made within nine months after the later of the date on which the transfer creating the interest is made or the day on which the person making the disclaimer attains age 21. 26 U.S.C. 2518(b)(2). Section 2518 is not directly involved in this case because it applies only to disclaimers of interests that were created after December 31, 1976 (26 C.F.R. 25.2518-1(a)), and Mrs. Irvine's interest was created in 1917. Congress contemplated that existing rules would continue to govern the timeliness of disclaimers made after 1976 of interests in property created before 1977. H.R. Rep. No. 1380, 94th Cong., 2d Sess. 67-68 (1976).

To coordinate with the effecive date of Section 2518, the Secretary proposed to amend Section 25.2511-1(c) by differentiating between disclaimers of property interests created before January 1, 1977, and those created after December 31, 1976. The Secretary proposed a new regulation, Section

Section 25.2518-2(c)(3) of the regulations specifically provides that, "[w]ith respect to inter vivos transfers, a taxable transfer occurs when there is a com-

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25.2518-1, governing qualified disclaimers under Section 2518 for interests created after December 31, 1976. For the disclaimer of interests created before January 1, 1977, the Secretary proposed to preserve the existing rule by recognizing that "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer" (Prop. Reg. § 25.2511-1(c)(2), 45 Fed. Reg. 48,925 (1980)). As noted by the dissenting judges below, "§ 25.2511-1(c)(2) and § 25.2518 are complementary regulations: interests created by 'taxable transfers' made after December 31, 1976, are subject to the 'new' uniform standards established by the 1976 Act and § 25.2518, while interests created by 'taxable transfers' before January 1, 1977, are subject to the 'old' standards set forth in § 25.2511-1(c)(2)" (Pet. App. 20a).

As originally proposed, the amended regulations did not refer to "taxable transfers" creating interests in the person disclaiming. See Prop. Reg. § 25.2511-1(c)(1), 45 Fed. Reg. 48,924 (1980) (referring to "a transfer creating an interest in the person disclaiming made after December 31, 1976"); Prop. Reg. § 25.2511-1(c)(2), 45 Fed. Reg. 48,924 (1980) (referring to "transfers creating an interest in the person disclaiming made before January 1, 1977"); Prop. Reg. § 25.2518-1(a), 45 Fed. Reg. 48,925 (1980) (referring to "the qualified disclaimer of transfers creating an interest in the person disclaiming made after December 31, 1976"). The term "taxable transfer" was first used when the amendments to Sections 25.2511-1 and 25.2518-1 were published in final form. See T.D. 8095, 1986-2 C.B. 160, 164, 165. This phrasing incorporated the explanation of Section 2518 that had been prepared by the Joint Committee on Taxation, which stated that, "[f]or purposes of this [statute], a transfer is considered to be made when it is treated as a taxable transfer, i.e., a completed transfer for gift tax purposes with respect to inter vivos transfers or upon the date of the decedent's death with respect to testamentary transfers" (Staff of the

pleted gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the completed gift." 26 C.F.R. 25.2518-2(c)(3). For the purpose of measuring the time in which to file a tax-free disclaimer, a "taxable transfer" occurs under the regulations "whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax" (*Ordway* v. *United States*, 908 F.2d at 895, quoting 26 C.F.R. 25.2511-1(c)(1)).[13]

Under this express regulatory definition, the irrevocable transfer in trust made by Mrs. Irvine's grandfather in 1917 constitutes a "taxable transfer" for purposes of the disclaimer regulation even though that transfer "was not subject to the gift tax" (26 C.F.R. 25.2511-1(c)(1)).[14] Hence, whether the in-

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Joint Committee on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 591 (Jt. Comm. Print. 1976)).

[13] The court of appeals suggested in this case that the regulatory definition of the term "taxable transfer"—which refers to any "completed gift" without regard to "whether a gift tax is imposed on [that] gift" (26 C.F.R. 25.2518-2(c)(3))—is concerned "with the $10,000 annual exclusion on gifts and has absolutely nothing to do with pre-Act transfers" (Pet. App. 9a). As the dissent correctly pointed out, however, "[t]he reference to the $10,000 annual exclusion on gifts in § 25.2518-2(c)(3) is merely *an illustration* of how a taxable transfer may occur when there is a completed gift regardless of whether the gift tax is imposed on the completed gift" (Pet. App. 22a). The single illustration provided by the regulation obviously does not exhaust the entire scope of its provisions.

[14] The gift in trust was completed by Mrs. Irvine's grandfather in 1917 when he relinquished power to control further disposition of the trust property. See *Estate of*

terest disclaimed by Mrs. Irvine was created before or after enactment of the federal gift tax, her failure to disclaim her interest "within a reasonable time" precludes her reliance on the safe-harbor provisions of the regulation.

The "reasonable time" requirement of the regulation addresses the question of "how long" the disclaimant has been aware of the property interest, not whether the property was initially transferred in trust on a taxed or tax-free basis. Whether or not the interest disclaimed was created before the federal gift tax was enacted is not relevant under the regulatory safe-harbor provision. Under the express terms of Sections 25.2511-1(c)(2) and 25.2518-2(c)(3) of the regulations, "as long as the transfer effected a completed gift of property, then the transfer is a 'taxable transfer,' even though the transfer may not be subject to federal gift tax" (Pet. App. 18a (McMillian, J., dissenting)).

The Internal Revenue Service has consistently adopted and applied this same understanding of the definition of "taxable transfer" contained in the regulation. When, as here, "[t]he Commissioner's interpretation of the Regulation has been consistent over the years," it "is entitled to respect." *Jewett* v. *Commissioner*, 455 U.S. at 318. See also *United States* v. *Nat'l Bank of Commerce*, 472 U.S. 713, 730 (1985).

b. Even if the court of appeals had been correct in concluding that the safe-harbor regulation does *not* apply to Mrs. Irvine's disclaimer, that would not sup-

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Sanford v. *Commissioner*, 308 U.S. at 43-44; *Burnet* v. *Guggenheim*, 288 U.S. at 286 (the gift is complete when it is "put beyond recall").

port a conclusion that the disclaimer is exempt from tax. The regulation merely creates a narrow exception to the otherwise comprehensive scope of the gift tax. It provides that if a disclaimer is made within a reasonable time, then (and only then) it "does *not* constitute the making of a gift" (26 C.F.R. 25.2511-1(c)(2)) (emphasis added). If a disclaimer does not come within the terms of this regulatory safe harbor, it is taxable under the general rule of the regulation (and the statute) that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax" (26 C.F.R. 25.2511-1(c)(1)). See *Dickman* v. *Commissioner*, 465 U.S. at 334 ("Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property").

In holding that Mrs. Irvine's disclaimer was not taxable if the safe-harbor provision was *not* applicable to her disclaimer, the court of appeals turned the gift tax scheme on its head. The regulation establishes a limited exception to the scope of the gift tax in the case of a disclaimer made "within a reasonable time after knowledge of the existence of the transfer" (26 C.F.R. 25.2511-1(c)(2)). As this Court held in *Jewett*, absent the lenity provided by the regulatory safe-harbor provision, the taxpayer "never had * * * a right" to escape taxation of her disclaimer. 455 U.S. at 317; see note 9, *supra*.

Such exemptions from taxation are to be narrowly construed: if a transaction does not come within the terms of the exemption, it remains taxable. See, *e.g.*, *Dickman* v. *Commissioner*, 465 U.S. at 334 n.4; *Bingler* v. *Johnson*, 394 U.S. 741, 751-752 (1969). If the majority's reading of "taxable transfer" were

correct, it would serve only to narrow the exception to taxability of disclaimers set forth in Section 25.2511-1(c)(2) of the regulations. It would not allow the disclaimer to escape tax.

3. The court of appeals further erred in concluding that, if the "reasonable time" requirement of Section 25.2511-1(c)(2) of the regulations is inapplicable to this case, then "state law governs the validity of Mrs. Irvine's disclaimer for federal gift tax purposes" (Pet. App. 10a). Based on this erroneous conclusion, the court held that, because Mrs. Irvine's disclaimer "is valid under Minnesota law" (*id.* at 11a), her "disclaimer therefore is not a transfer upon which a gift tax is owed" (*ibid.*).[15] The analysis applied by the court of appeals in this case was specifically repudiated by this Court in *Jewett* v. *Commissioner*.

The validity of the disclaimer under local law (which here, as in *Jewett*, 455 U.S. at 311, has not been contested by any party) is relevant only because, if the disclaimer were *not* valid under local law, there would have been no completed transfer and this case would never have arisen. See 26 U.S.C. 2501(a)(1) (imposing a tax on "the transfer of property by gift"). The fact that the disclaimer was valid under Minnesota law merely establishes that there was in fact a "transfer of property" (*ibid.*). It has no bearing on whether or not that transfer was "by gift" and is therefore subject to the gift tax. The question

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[15] As we have already shown, if the safe harbor afforded by Section 25.2511-1(c)(2) of the regulations is not available in this case, then the disclaimer is taxable under the general provisions of the statute and regulation. See pages 14-20, 27-28, *supra*.

whether a disclaimer constitutes a transfer of property "by gift" was resolved by this Court in *Jewett*, where the Court held that the transfer "by means of a disclaimer[] of a contingent future interest in a trust" is "unquestionably" within the scope of the gift tax (455 U.S. at 310).

By treating state law as dispositive of the existence of federal gift tax liability, the court of appeals has, perhaps unconsciously, resurrected the discredited rationale of its decisions in *Keinath* v. *Commissioner*, 480 F.2d 57, 61 (8th Cir. 1973), and *Cottrell* v. *Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*). In those cases, the court of appeals held that, because Section 25.2511-1(c) did not specify what is a "reasonable time," state law controlled that determination. Those decisions were relied on by the taxpayer in *Jewett* for the contention that the draftsmen of the regulation merely intended to codify cases holding that "state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation." 455 U.S. at 315. This Court disagreed, noting that the taxpayers' "interpretation of the Regulation would render half of it superfluous" (455 U.S. at 316):

> The Regulation explicitly imposes two requirements: (1) the disclaimer must be effective as a matter of local law; and (2) the disclaimer must be made within a reasonable time. If timeliness were governed solely by local law, the second requirement would be redundant. While it is possible that local law may require a disclaimer to be timely to be effective, such a requirement would not absolve the taxpayer from the separate timeliness requirement imposed by the federal Regulation. Otherwise, the Regulation would be

complete with a single requirement that the disclaimer be effective under local law.

The fact that Mrs. Irvine's disclaimer was valid under state law obviously does not, by itself, establish an exemption from tax. If it did, *any* valid disclaimer would be exempt and the gift tax would never apply to a "transfer of property by gift" (26 U.S.C. 2501(a)(1)) effected by means of disclaimer. The Court squarely rejected that very contention in *Jewett*. 455 U.S. at 316.

The court of appeals failed in this case to recognize the differing purposes behind state and federal timeliness requirements for disclaimers.[16] State property law concepts regarding the refusal to accept ownership do not adequately deal with the federal concern that disclaimers may be used in an attempt to evade the gift or estate tax. State law, which is primarily concerned with balancing conflicting claims to property and with protecting the rights of creditors and other third parties, may allow considerable time to pass after a person learns of a property interest before he must disclaim. See *Jewett* v. *Commissioner*, 70 T.C. at 436-437. The federal gift tax is concerned, however, with control over the disposition of property: "the passage of time is crucial to the scheme of the gift tax" (*Jewett* v. *Commissioner*, 455 U.S. at 316 n.17, quoting *Jewett* v. *Commissioner*, 70 T.C. at 437). The fact that the disclaimer was valid

[16] "Since the federal revenue laws are designed for a national scheme of taxation, their provisions are not to be deemed subject to state law 'unless the language or necessary implication of the section involved' so requires." *Helvering* v. *Stuart*, 317 U.S. 154, 161 (1942), quoting *United States* v. *Pelzer*, 312 U.S. 399, 402-403 (1941).

under Minnesota law does not satisfy the federal gift tax concern that Mrs. Irvine's 48-year delay "made it likely that the renunciation decision was part of the taxpayer's personal estate planning" (*Jewett* v. *Commissioner*, 455 U.S. at 316 n.17).

Because Mrs. Irvine waited 48 years to disclaim her interest in the Ordway Trust, her disclaimer was not made within the "reasonable time" required to obtain the protection of the regulatory safe harbor. The 1979 disclaimer of her interest in the Trust represents a transfer of property by gift (*Jewett* v. *Commissioner*, 455 U.S. at 310) and is therefore properly subject to the federal gift tax.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and
FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a 1986 Regulation, that by its express terms governs only disclaimers of interests created in "*taxable* transfers" before 1977, applies to tax as a gift a disclaimer of a remainder interest in a trust created in 1917, fifteen years before enactment of the federal Gift Tax Act.

2. Whether the taxation of a disclaimer of a remainder interest in a trust created before enactment of the federal Gift Tax Act in 1932

(a) violates Congressional intent that the Act not be retroactively applied to change the established disclaimer rules for pre-Act property interests; or

(b) violates the Due Process Clause of the Fifth Amendment in that the time for an effective disclaimer by Mrs. Irvine and other taxpayers similarly situated expired before enactment of the Gift Tax Act.

3. In the alternative, if the 1986 Regulation applies

(a) whether Mrs. Irvine's Disclaimer was effective for federal gift tax purposes because her remainder interest was subject to significant contingencies in addition to survival, unlike the remainder interest at issue in *Jewett v. Commissioner*, 455 U.S. 305 (1982), was made shortly after the termination of the trust, and also was made in reliance on the then controlling law; or

(b) whether the decision in *Jewett* should be reconsidered and overruled.

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FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

This is an action for refund of $7,530,706.90, plus statutory interest, in federal gift tax erroneously assessed against and collected from Sally O. Irvine.1/ It involves the effectiveness for federal gift tax purposes of Mrs. Irvine's written Disclaimer of a portion of a remainder interest in the Ordway Trust. The Trust was created by her grandfather Lucius Ordway in 1917, fifteen years before enactment of the federal Gift Tax Act on

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1/ Mrs. Irvine died in 1987, and Respondents John O. Irvine and First Trust National Association are co-representatives of her Estate, the successor-in-interest to her refund claim. Respondent First Trust National Association's list of parent companies pursuant to S. Ct. R. 29.1 was included in its Brief in Opposition at 3 n.2. It has no subsidiaries.

June 6, 1932. A disclaimer is a refusal to accept property *ab initio*, and a taxpayer's right to disclaim has always been recognized by Congress as a matter of general property law. Mrs. Irvine's Disclaimer was a valid, timely, and effective refusal to accept ownership of her interest under Minnesota law, the applicable property law. The district court and the Eighth Circuit ruled *en banc* that her disclaimer was also effective for federal gift tax purposes and did not constitute a transfer subject to tax.

The Government, seeking reversal, complains that Mrs. Irvine "waited 48 years" to disclaim, too long under the Government's interpretation of Treas. Reg. § 25.2511-1(c). But the Government fails to tell this Court it has conceded that, under its interpretation of the Regulation, Mrs. Irvine's time for making an effective disclaimer expired before the Gift Tax Act was even enacted. This interpretation is contrary to the plain language of the Regulation, which applies only to disclaimers of interests created in "taxable transfers" before 1977. Mrs. Irvine's interest was created in 1917 in an obviously nontaxable transfer. The Government's interpretation is also contrary to the explicit Congressional intent that the Gift Tax Act not be retroactively applied and that any disclaimer rules not be retroactively applied to existing interests. Finally, it is just plain unfair.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes and regulations set forth by Petitioner, Br. 2,[2/] the following constitutional and statutory provisions are directly involved in the case:

1. The Due Process Clause of the Fifth Amendment to the U.S. Constitution, which provides that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . ."

2. Section 501(b) of the Revenue Act of 1932, 47 Stat. 245 ("Gift Tax Act" or "Act"), which provides that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]."

2/ "Br." refers to Petitioner's brief on the merits, "Pet." refers to the petition for writ of certiorari, "PA" refers to the appendix to the petition, "Br. Opp." refers to Respondents' brief in opposition, "JA" refers to the joint appendix, and "RA" refers to the appendix to this brief. "8th C. Br." refers to Petitioner's main brief in the court of appeals, "8th C. App." refers to Petitioner's appendix in the court of appeals, "8th C. S. App." refers to Respondents' supplemental appendix in the court of appeals, and "D. Ct. Br." refers to Petitioner's main brief filed in the district court in support of its motion for partial summary judgment. "Tape Oral Arg." refers to the taped oral argument before the *en banc* court of appeals on January 6, 1992, which is on file with the clerk of that court, and of which Respondents have prepared a transcription. For the Court's convenience, Respondents have lodged a copy of the tape with the Clerk of this Court.

STATEMENT OF THE CASE

A. History and Terms of the Trust

Mrs. Irvine was six years old when her grandfather, Lucius Ordway ("Lucius"), created the Ordway Trust ("Trust") in 1917. As the Government has acknowledged, Mrs. Irvine learned of her remainder interest "at least by the time she reached the then-prevailing age of majority." JA 68; D. Ct. Br. 4-5; 8th C. Br. 3. The then-prevailing age of majority for women in Minnesota was eighteen, which Mrs. Irvine reached in 1928. Minn. Stat. Rev. 1866, ch. LIX, § 2; *see Vlasak v. Vlasak*, 204 Minn. 331, 333, 283 N.W. 489, 490 (1939).3/

The Trust was to continue until the death of the survivor of Lucius's wife and five children. JA 33. Then, the Trust would terminate and the Trust principal would be distributed as follows:

> Upon the death of the survivor of my wife and children, and the termination of the aforesaid trust, said trustees shall pay over and transfer the trust fund in equal shares to each of my grand children per capita and not per sturpes [sic]. If any of my grand children shall then have died leaving issue, said children shall be entitled to equal portions of the share of said deceased grand child.

JA 33.

Mrs. Irvine's remainder interest in the Trust principal entitled her to a share of that principal only after the deaths of Lucius's wife and five children, only if she

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3/ In the lower courts, the parties had assumed that the age of majority was 21, which Mrs. Irvine reached in 1931. Therefore, there are several incorrect references in the lower court decisions and briefs to 1931, instead of 1928.

were alive at that time, and only if she were to accept the interest. PA 2a-3a. Her share of that principal would be equal to one divided by the number of Lucius's grandchildren living at the time of the Trust's termination plus the number of deceased grandchildren with issue then living. Her share thus changed each time a grandchild was born or died without issue and was uncertain until the Trust terminated.

B. Mrs. Irvine's Disclaimer

In June 1979, upon the death of the survivor of Lucius's wife and children, the Trust terminated. On that date, twelve of Lucius's grandchildren, including Mrs. Irvine, were living, one grandchild had died leaving issue, and another had died without issue. PA 3a, 52a. Mrs. Irvine then became finally ascertained as a remainder beneficiary of the Trust, and her remainder interest at that time first became indefeasibly fixed as a one-thirteenth interest in the Trust principal. Mrs. Irvine completely and unequivocally disclaimed a portion of that interest by the written Disclaimer filed shortly thereafter. PA 3a.

Minnesota law recognized, as it did throughout the Trust term, a beneficiary's right to refuse to accept ownership of a remainder interest in a trust by disclaimer. *See Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) (interpreting Minnesota common law and statute), *overruled on other grounds, Jewett v. Commissioner*, 455 U.S. 305 (1982). The Government concedes that Mrs. Irvine's Disclaimer made shortly after Trust termination was a valid, timely, and effective refusal to accept ownership of the interest under Minnesota law. Br. 4. In the courts below, the Government also conceded, by stipulation and at argument, that Mrs. Irvine never accepted any part of her remainder interest. 8th C. Br. 4;

Tape Oral Arg.4/ As a result of the Disclaimer, Mrs. Irvine was treated under Minnesota law as if she had died before the Trust's termination, and her children became entitled to equal shares of the disclaimed interest in accordance with the terms of the Trust instrument. PA 4a.

C. The State of the Law at the Time of the Disclaimer

Since the enactment of the Gift Tax Act in 1932, Rev. Act of 1932, §§ 501-532, 47 Stat. 245-59, the established rule has been that a disclaimer valid under applicable property law would not be a transfer for federal gift tax purposes. This rule was established in *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.) (accepting 1931 district court's determination, 58 F.2d 329 (N.D. Ohio 1931), that state law controls), *cert. denied*, 290 U.S. 641 (1933), and it was applied consistently for years in gift tax cases. *E.g.*, *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.) (court followed *Brown* rule and held that a disclaimer by heirs of an intestate estate would be treated as a transfer of property for federal gift tax purposes because Minnesota law provides that, in cases of intestate succession, property vested immediately in heirs upon decedent's death and thus could not be disclaimed), *cert. denied*, 344 U.S. 836 (1952); *Maxwell v. Commissioner*, 17 T.C. 1589 (1952). The Treasury Department also accepted and consistently

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4/ Court: Is that covered by the stipulation?

Mr. Paup: We have agreed there was no acceptance as to the remainder interest.

[Michael L. Paup, appearing for the Government.]

applied the *Brown* rule. *See, e.g.*, JA 39 (GCM 27626 (Jan. 15, 1953)), RA 1 (GCM 24626 (1945)).5/

In 1958, the Treasury Department promulgated Treasury Regulation § 25.2511-1(c), interpreting the gift tax provisions enacted in the 1932 Gift Tax Act and reenacted in the 1954 Internal Revenue Code ("Code"). The Regulation provided:

> Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent . . . a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be . . . effective under the local law.

The 1958 Regulation was the first time the IRS enunciated requirements for an effective disclaimer for federal gift tax purposes.

Mrs. Irvine resided in Minnesota, in the Eighth Circuit, for her entire life. At the time of her Disclaimer in 1979, *Keinath*, a 1973 Eighth Circuit decision involving a Minnesota resident, was the only appellate court case that had interpreted the 1958 Regulation. *Keinath* involved a remainder interest in a trust created in 1944, which was disclaimed shortly after the trust terminated in 1963. *Keinath* was the first time the Government publicly

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5/ A GCM (General Counsel's Memorandum) states the position of the Service's Office of Chief Counsel. GCMs are widely circulated throughout the IRS as statements of IRS policy. *Taxation With Representation Fund v. Internal Revenue Service*, 646 F.2d 666, 669–71 (D.C. Cir. 1981).

took the position that the "reasonable time" referenced in the 1958 Regulation began to run at the time the remainder interest was created, rather than at the time the trust terminated. The Eighth Circuit rejected this position, holding that under both the 1958 Regulation and Minnesota law, the "reasonable time" began to run when the trust terminated. The 1963 disclaimer was thus timely. 480 F.2d at 64. The Government did not seek further review of *Keinath*, and its announced policy at the time of Mrs. Irvine's Disclaimer was that it would follow *Keinath* as to taxpayers residing in the Eighth Circuit.[6/] *See, e.g.*, TAM 7829008 (CCH) (Apr. 14, 1978).[7/] Mrs. Irvine's Disclaimer was clearly timely for federal gift tax purposes under the 1958 Regulation as interpreted in *Keinath*.

6/ In *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980), considered by the *en banc* Eighth Circuit, the Government did not even ask the *en banc* court to overrule *Keinath*, and the Eighth Circuit reaffirmed *Keinath*. *Id.* at 1131. *Cottrell* involved the disclaimer of a remainder interest in a trust created in 1937. The disclaimer, made in 1970, was timely under state law and was also effective for federal gift tax purposes.

7/ A TAM (Technical Advice Memorandum) is a written statement of IRS policy issued by the IRS National Office in connection with examination of a taxpayer's return or consideration of a taxpayer's claim for refund or credit. Treas. Reg. § 301.6110-2(f); *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350, 352 (D.C. Cir. 1974).

D. The Government's Assessment of Tax

Nearly three years after Mrs. Irvine's Disclaimer, this Court decided *Jewett*, which involved a 1972 disclaimer of a fixed fifty percent remainder interest in a trust created in 1939. The *Jewett* majority held that the ambiguous 1958 Regulation required the taxpayer to disclaim his interest within a "reasonable time" of the 1939 transfer, not the event causing the trust to terminate (which had not yet occurred). 455 U.S. at 318. *Jewett* thus rejected *Keinath*'s interpretation of the 1958 Regulation in the context of the facts presented.

The IRS assessed the tax against Mrs. Irvine in 1982 immediately after the *Jewett* decision, apparently believing that *Jewett*'s interpretation of the 1958 Regulation controlled in Mrs. Irvine's case. 8th C. S. App. 2, 11. Mrs. Irvine immediately paid the asserted liability, then filed an administrative claim for refund of the erroneously assessed tax.

The Treasury Department in 1986 amended the 1958 Regulation, limiting its application to "taxable transfers creating an interest in the person disclaiming made before January 1, 1977." The Government seeks to apply the 1986 Regulation to Mrs. Irvine's Disclaimer, and acknowledges that the 1958 Regulation on which its assessment was based, and which was before this Court in *Jewett*, is inapplicable. Br. 21 n.8; Tape Oral Arg., *quoted at* Br. Opp. 8 n.8. Mrs. Irvine's interest was created in 1917, before there was any gift tax, but the Government nonetheless contends that that was in fact a "taxable transfer." The Government has conceded that Mrs. Irvine's time for making an effective disclaimer under the 1986 Regulation expired *before* enactment of the Gift Tax

Act in 1932.8/ In short, the Government admits that Mrs. Irvine had no time at all to make an effective disclaimer.

E. Action by the Lower Courts

Both the district court and the *en banc* Court of Appeals for the Eighth Circuit rejected the Government's harsh, retroactive application of the 1986 Regulation and concluded that Mrs. Irvine's Disclaimer was not a transfer for federal gift tax purposes. The district court held that disclaimers of pre-Act interests like Mrs. Irvine's are effective for federal gift tax purposes as long as they are

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8/ Court: When in your view must she have done the disclaiming to have been reasonable?
Mr. Paup: Well, the regulations don't establish a bright line.
Court: But what's the Government's position?
Mr. Paup: Our position is that it had to be within a reasonable time.
Court: As to what, Mr. Paup, as to what?
Mr. Paup: Within a reasonable time after knowledge of the existence of the initial transfer.
Court: And, prior to the passage of the gift tax?
Mr. Paup: Ah, in this case, certainly, since she knew about it, reached her majority in 1931.
Court: So, the Government's position is to have been effective it would have had to have been prior to first enactment, initial enactment of the tax.

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Mr. Paup: That's correct, your honor.

Tape Oral Arg. The Government's concession that the 1986 Regulation required Mrs. Irvine to disclaim before enactment of the Gift Tax Act reflects the current IRS position that a disclaimer of any interest created before 1977 will be timely only if made within nine months after the disclaimant reaches the age of majority. PLR 9308007 (CCH) (Nov. 24, 1992). A "PLR" (private letter ruling) is a statement of IRS policy. *Tax Analysts and Advocates v. Internal Revenue Service*, 505 F.2d 350, 353 (D.C. Cir. 1974).

valid under applicable property law, and rejected the Government's interpretation of the 1986 Regulation as contrary to Congressional intent that the gift tax statute not be retroactively applied. PA 56a-58a. Although an Eighth Circuit panel initially reversed the district court's opinion, the Eighth Circuit sitting *en banc* on rehearing found that the plain language of the 1986 Regulation, limiting its application to disclaimers of interests created in pre-1977 "taxable transfers," was dispositive, particularly in light of the Congressional prohibition against retroactive application of the Gift Tax Act. PA 7a. Because the 1986 Regulation did not apply, the *en banc* Eighth Circuit held that, based upon *Jewett* and *Hardenbergh*, the effectiveness of Mrs. Irvine's Disclaimer for federal gift tax purposes is determined by looking to state law. PA 10a-11a. Under Minnesota law, her Disclaimer was valid, and thus it was effective for federal gift tax purposes.

SUMMARY OF ARGUMENT

The Government seeks to apply the 1986 Regulation to tax Mrs. Irvine's Disclaimer of her remainder interest created in 1917, fifteen years before enactment of the Gift Tax Act. Under the 1986 Regulation, which by its terms applies only to disclaimers of interests created in "taxable transfers" before 1977, the Government concedes that Mrs. Irvine's time for disclaimer expired before enactment of the gift tax. The Eighth Circuit correctly held *en banc* that the plain language of the 1986 Regulation forbids the Government's harsh, untenable construction. Mrs. Irvine's interest was created before enactment of the Gift Tax Act, in an obviously nontaxable transfer, and therefore the 1986 Regulation plainly does not apply. Because the 1986 Regulation does not apply, the effectiveness of Mrs.

Irvine's Disclaimer for federal gift tax purposes must be determined under the *Brown* rule, the gift tax disclaimer rule that applies to cases not governed by the Regulation.

Application of the 1986 Regulation to Mrs. Irvine, to apply a new disclaimer rule to an interest created before enactment of the Act, also violates Congressional intent. Congress has always recognized that an effective disclaimer is not a transfer taxable as a gift. Congress has also explicitly directed that the provisions of the Gift Tax Act are not to be retroactively applied. The Government's application of the 1986 Regulation to pre-Act interests violates Congressional intent in both these respects. It is also fundamentally at odds with Congress's consistent practice in making each new effective disclaimer rule applicable only to interests created after enactment of the new rule. Under this consistent scheme, Mrs. Irvine's Disclaimer, valid under Minnesota law, was effective for federal gift tax purposes, because the property law rule was the disclaimer rule in effect at the time her interest was created.

The Government's retroactive application to impose a time period for disclaiming that expires before enactment of the Act also violates the Due Process Clause because, without notice, Mrs. Irvine and others in a small class of taxpayers whose interests were created in pre-Act transfers and whose time for disclaimer ran before enactment of the Act, are treated differently, and much more harshly, than all other taxpayers. Mrs. Irvine and those in her class are precluded from making an effective disclaimer, while all others have notice of the Gift Tax Act and an opportunity to make an effective disclaimer. There is no conceivable legitimate basis for this arbitrary, different treatment and the Government has offered none.

The Government treats this case as a replay of *Jewett*, but *Jewett* involved decidedly distinct facts. Moreover, *Jewett* addressed only a "narrow question" of

interpretation of the ambiguous 1958 Regulation as applied to a disclaimer of an interest created well after enactment of the federal gift tax. At issue here is the plain language of the 1986 Regulation. Also, the Government's attempt to apply the 1986 Regulation to pre-Act interests raises statutory and constitutional issues that were not before the Court in *Jewett*.

Even if the 1986 Regulation could apply to Mrs. Irvine, this Court should hold that Mrs. Irvine's Disclaimer was timely and effective for federal gift tax purposes. First, the "transfer" referred to in the 1986 Regulation in cases like hers should mean the 1979 Trust termination, rather than the 1917 creation of her interest. Significant contingencies were present affecting the size of Mrs. Irvine's remainder interest until termination, in addition to the survival contingency considered by the Court in *Jewett*. Three federal circuit courts have confined *Jewett* to its facts and held post-*Jewett* that an additional contingency renders effective a disclaimer made after the contingency event occurs, even though long after creation of the interest. Second, unlike Jewett, Mrs. Irvine had a pre-existing right to disclaim her interest and disclaimed in reliance on *Keinath*, the controlling law that the IRS had announced it would follow in her circuit. The Government's application of the 1986 Regulation to Mrs. Irvine to preclude her from making an effective disclaimer under these circumstances is fundamentally unfair.

Finally, this Court's belief in *Jewett*, based on a statement made by counsel for the Commissioner during oral argument, that the Commissioner had consistently interpreted the Code and the ambiguous 1958 Regulation regarding disclaimers was integral to its decision to uphold the Commissioner's interpretation. In fact, the Commissioner has not consistently applied the Regulation. The Commissioner's position adopted by the *Jewett* majority was newly developed in the late 1960s for

litigation, well after the fact. Documents recently discovered and not before the Court in *Jewett* demonstrate that the 1958 Regulation was intended to "codify" the *Brown* rule that the Treasury Department had applied for years in federal gift tax cases. Because the majority's interpretation of the 1958 Regulation in *Jewett* was based upon erroneous information, *Jewett* should be reconsidered in light of these new facts and overruled.

ARGUMENT

A. The 1986 Regulation Does Not Apply To Interests Created Before Enactment of the Federal Gift Tax, and Thus a Disclaimer of a Pre-Act Interest is Effective for Tax Purposes if Valid under State Law.

By its express language, the 1986 Regulation applies only to disclaimers of interests created in "taxable transfers" before 1977.2/ Mrs. Irvine's interest was created in 1917, fifteen years before enactment of the Gift Tax Act, in an obviously nontaxable transfer. The Government has acknowledged that Mrs. Irvine's time for making an effective disclaimer under the 1986 Regulation expired before enactment of the federal gift tax, before she ever could have known that a disclaimer not yet required under state law nevertheless would be untimely, and thus taxable, under a federal tax statute not yet enacted. The *en banc* court of appeals, based upon the plain language of

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2/ In *Jewett*, this Court dealt with a "narrow question" of interpretation of the ambiguous 1958 Regulation, as applied to an interest created after the Gift Tax Act was enacted. 455 U.S. at 306. *Jewett* did not decide the issue presented here – interpretation of the plain language of the 1986 Regulation. In *Jewett*, the 1939 transfer creating an interest in the person disclaiming was clearly a "taxable transfer."

the 1986 Regulation, rejected the Government's untenable construction. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) (interpretations should "avoid untenable distinctions and unreasonable results whenever possible"). Its holding was correct and should be affirmed.

It is fundamental that for a transfer to be "taxable" there must be an applicable tax in existence when the transfer is made. *See* PA 7a. Congress explicitly directed in 1932 that the federal gift tax "shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]," Act § 501(b), and continued that prohibition in all revisions of the Act to the present. *See* I.R.C. § 2502(b) (current version).10/ In light of that "consistently expressed intent," the *en banc* court rejected the Government's view that "the term 'taxable transfer' in [the 1986 Regulation] can refer to a transfer made before the enactment of the gift tax." PA 10a. The court reasoned that "[l]ogic, history, the expressed intent of Congress, and a straightforward reading of the regulations all join here to compel the opposite conclusion." PA 10a (footnote omitted).

The Government misleadingly implies that there is language in a different paragraph of the 1986 Regulation cited by the Government, in § 25.2511-1(c)(1), to support its view that "taxable transfers" include nontaxable, pre-Act transfers. In its brief, immediately after identifying and quoting from the Regulation, the Government states:

10/ Section 501(b)'s prohibition has constitutional underpinnings. In *Untermeyer v. Anderson*, 276 U.S. 440 (1928), this Court struck down the original 1924 gift tax on the ground it violated due process because it attempted to tax transfers completed prior to its enactment, and that statute was repealed in 1926. *See also Blodgett v. Holden*, 275 U.S. 142 (1927) (four justices holding 1924 gift tax unconstitutional, while others finding for taxpayer on statutory grounds). *Nichols v. Coolidge*, 274 U.S. 531 (1927), cited by the Government, Br. 16 n.5, did not involve any question regarding the 1924 gift tax.

> Under this express regulatory definition, the irrevocable transfer in trust made by Mrs. Irvine's grandfather in 1917 constitutes a "taxable transfer" for purposes of the disclaimer regulation even though that transfer "was not subject to the gift tax" (26 C.F.R. 25.2511-1(c)(1)).

Br. 26 (footnote omitted). But that paragraph of the 1986 Regulation cited by the Government, which is quoted in full at PA 61a-62a, contains no such language; it merely restates the general statutory requirements for imposition of the gift tax, applicable only to transfers after June 6, 1932. *See* Act § 501; current Code §§ 2501 and 2511. The 1986 Regulation provides no support at all for the Government's interpretation of "taxable transfers."11/

The Government virtually conceded in this case, during oral argument in mid-1989 in the district court, that the "taxable transfers" language renders the 1986 Regulation plainly inapplicable. It candidly informed the court that the Treasury Department intended to change that language:

> It's poor draftsmanship, there is no doubt about that, and the Service has informed me they will be issuing in the next 90 days or so clarification on this point.

11/ The Government also baldly asserts that the Commissioner has consistently interpreted the "taxable transfers" language in the 1986 Regulation, and then, relying on *Jewett*, states that this consistency entitles the Commissioner's interpretation to respect. Br. 27. But the Commissioner has not consistently applied either the 1986 Regulation or its predecessor the 1958 Regulation. *See infra* at 34-35 (discussing joint tenancy cases and 1966 letter ruling in which time for disclaimer did not run from "completed gift" but occurrence of subsequent contingency event).

8th C. App. 40 (transcript of oral argument in district court). Despite its representation to the court, the Government never made the change and ultimately terminated the amendment project. *See* IRS Notice 92-12, 1992-1 C.B. 500, 501.

Because the plain language of the 1986 Regulation is of no help to the Government, the Government seeks to justify its interpretation by relying on a definition of "taxable transfer" found in a *different* regulation promulgated to interpret a *different* Code provision, Br. 24-26, and by citing the Eleventh Circuit case involving a disclaimer made by Mrs. Irvine's brother, *Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). *Ordway* was wrongly decided, in part because the court there incorrectly relied upon Section 2518 of the Code and Treas. Reg. § 25.2518-2(c)(3).12/ Section 2518 and its implementing regulation established a new disclaimer rule that requires disclaimers of interests created after 1976 to be made within nine months after the "transfer" creating the interest. Pub. L. 94-455, §§ 2009(b)(1), 2009(e)(2), 90 Stat. 1893. A "taxable transfer" in Treas. Reg. § 25.2518–2(c)(3) is defined -- solely for purposes of the nine-month rule -- as one that "occurs when there is a completed gift for Federal gift tax purposes regardless of whether a gift tax is imposed on the

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12/ The Eleventh Circuit also totally overlooked the statutory and constitutional issues presented in *Ordway*. Those issues, however, were fundamentally different from the statutory and constitutional issues in this case, *see infra* at 20-33, because Ordway, much younger than his sister Mrs. Irvine, did not learn of his interest until 1941 and did not reach the age of majority until 1943. *Ordway*, 908 F.2d at 891-92. Under the 1986 Regulation, Ordway's time for disclaimer did not begin to run until well after enactment of the Gift Tax Act, while Mrs. Irvine's time for disclaimer expired before the Act.

completed gift."[13] This definition of "taxable transfer" cannot encompass interests created before enactment of the federal gift tax, because Section 2518 and its implementing regulation explicitly apply *only* to interests created after 1976. It clearly is inapplicable to Mrs. Irvine's Disclaimer. *See* PA 8a. ("[R]eliance on a single sentence from a regulation explicating a section of the Code [Section 2518] that is plainly inapplicable to this situation is inappropriate and misplaced.") (footnote omitted).[14]

The Government distorts the legislative history of Section 2518 to suggest that Congress required the Treasury Department to include "taxable transfers" in the 1986 Regulation to "coordinate with" the effective date of Section 2518. *See* Br. 24-26 n.12. In support, the Government misquotes the post-enactment explanation of Section 2518 prepared by the Staff of the Joint Committee on Taxation:

> [f]or purposes of this [statute], a transfer is considered to be made when it is treated as a taxable transfer, i.e., a completed transfer for gift tax purposes with respect to inter vivos transfers or upon the date of the decedent's death with respect to testamentary transfers.

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[13] In that context, Treas. Reg. § 25.2518-2(c)(3) provides that a "taxable transfer" can trigger Section 2518's nine-month time period even if the transfer is not taxed because of the $10,000 annual exclusion or other exemptions, deductions, or credits under the federal gift tax statute. *E.g.*, I.R.C. § 2523 (deduction for gifts to spouse).

[14] Even if it did apply, however, Treas. Reg. § 25.2518-2(c)(3) supports Respondents, not the Government, because it requires a "completed gift for Federal gift tax purposes." The *en banc* court below rightly expressed "difficulty in understanding how there can be, in the language of section 25.2518-2(c)(3), 'a completed gift for Federal gift tax purposes,' unless a federal gift tax is in force when the gift is made." PA 8a-9a.

Br. 25 n.12 (quotations omitted). The Government's selection of the bracketed word "statute" inaccurately suggests a much broader Congressional intent than the Joint Committee staff described. Rather than "statute," the staff used the word "requirement," and was referring directly to Section 2518's nine-month rule, which applies only to post-1976 interests. *See* Staff of the Joint Committee on Taxation, 94th Cong., 2d Sess., *General Explanation of the Tax Reform Act of 1976*, at 591 (Jt. Comm. Print, 1976), *reprinted in* 1976-3 C.B. 1, 603. If the Treasury Department wanted to "coordinate," it only needed to have said that the 1958 Regulation would apply to any disclaimers not governed by Section 2518. By adding the "taxable transfers" language, the Department went far beyond what was needed to coordinate effective dates.

The Government's interpretation of the 1986 Regulation is contrary to the plain language of the Regulation.15/ Mrs. Irvine's interest was not created in a "taxable transfer" before 1977. It was created in 1917, before there was a federal gift tax statute, in an obviously nontaxable transfer. As such, the 1986 Regulation is plainly inapplicable to Mrs. Irvine's Disclaimer. Because the 1986 Regulation does not apply, the effectiveness of Mrs. Irvine's Disclaimer for federal gift tax purposes must be determined under the *Brown* rule, the gift tax disclaimer rule that applies to cases not governed by the Regulation. *See Jewett*, 455 U.S. at 315-16; *Hardenbergh*, 198 F.2d at 66. Under that rule, her Disclaimer was valid

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15/ The government's position in the Eighth Circuit rested squarely on the "taxable transfers" language in the 1986 Regulation:

Court: Okay, so you've got to win with the definition of taxable transfer?

Mr. Paup: Yes, sir, and I think we can and should win with the definition of taxable transfer.

Tape Oral Arg.

under Minnesota law and thus is not a transfer subject to the federal gift tax.

B. Application of the 1986 Regulation to Pre-Act Interests Would Violate Congressional Intent and the Due Process Clause.

If the Court finds that the "taxable transfers" language does not limit application to post-Act interests, Respondents submit that application of the 1986 Regulation of the 1986 Regulation to pre-Act interests nevertheless violates Congressional intent and the Due Process Clause. The Government has conceded that under its interpretation of the 1986 Regulation, Mrs. Irvine never could have made a disclaimer effective for federal gift tax purposes. Congress, however, has always intended that an effective refusal to accept property, by means of a disclaimer, not be treated as a "transfer" of property by gift. Congress also has consistently and explicitly stated its intent that the Act must not be retroactively applied. Thus, even if its terms permitted it, application of the 1986 Regulation to pre-Act interests and, in particular, to preclude Mrs. Irvine from ever making an effective disclaimer would be contrary to Congressional intent in both these respects and, therefore, invalid under the Code.[16/] It also would violate the Due Process Clause.

16/ The district court based its summary judgment for Respondents primarily on this ground. PA 56a-58a. The *en banc* court of appeals, satisfied that the 1986 Regulation by its express terms did not apply to Mrs. Irvine's Disclaimer, did not reach this overriding issue of Congressional intent. *Jewett* did not involve the overriding statutory and constitutional issues presented in this case, because Jewett's interest was created in 1939, well after enactment of the Gift Tax Act.

1. **Congress Has Consistently Provided that Effective Disclaimers Are Not Transfers Subject to Federal Gift Tax.**

Section 501(a) of the Gift Tax Act enacted in 1932 imposed a tax on the "transfer . . . of property by gift." The Act further provided that "[t]he tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." Act § 501(b).12/ The words "transfer," "property," and "gift" have their source in property law. As a fundamental precept of property law, a transfer is not complete until accepted, and a person cannot be forced to accept property. The right to refuse to accept a gift, by means of a disclaimer, is universally recognized under general property law, and an effective disclaimer is not a "transfer" by the disclaimant. *See Brown*, 63 F.2d at 917.

Since 1932, Congress has explicitly and repeatedly recognized that taxpayers, by disclaimer, can effectively refuse to accept gifts without such refusals constituting "transfers" subject to federal gift tax. In 1948, when Congress enacted the estate tax marital deduction and prescribed the effect of an estate beneficiary's disclaimer on the amount of property qualifying for the deduction, Rev. Act of 1948, § 361(a), 62 Stat. 117, 121, Congress recognized that a disclaimant would not be considered to have made a transfer subject to gift tax. The Senate Finance Committee reporting the bill explained:

> The gift tax amendments providing for a marital deduction do not contain any provision corresponding to the disclaimer

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12/ These provisions were reenacted in the 1939 and 1954 Codes, with no significant changes, and are contained in Sections 2501 and 2511 of the current Code.

> provisions under the estate tax marital deduction . . . . *Such provisions are unnecessary under the gift tax for the reason that if any person disclaims or refuses an attempted gift a transfer by gift is not considered made.*

S. Rep. No. 1013, 80th Cong., 2d Sess. 32 (1948), *reprinted in* 1948 U.S. Code Cong. & Ad. Serv. 1163, 1255 (emphasis added).

Congress explicitly recognized that an effective disclaimer does not constitute a transfer subject to gift tax in the Powers of Appointment Act of 1951, Ch. 165, § 3(a), 65 Stat. 93 (the "1951 Act"). In the 1951 Act, Congress implemented amendments to the gift tax first introduced in the Revenue Act of 1942, Title IV, § 452(c), 56 Stat. 952 (the "1942 Act"), extending the reach of the statute to tax the exercise and release of general powers of appointment.[18/] In the 1951 Act, Congress specifically provided that a disclaimer of a general power, which is a refusal to accept property *ab initio*, is not a taxable release of the power.

18/ A power of appointment is a power conferred by one person on another to select and nominate the person or persons who are to receive and enjoy property. Black's Law Dictionary at 1054 (5th ed. 1979). A general power is a power that the holder can exercise in favor of himself or herself or his or her estate or creditors. I.R.C. § 2514(c). A release is a relinquishment of the ability to exercise a general power. Before the 1942 Act, neither the release, nor even the exercise, of a general power was a "transfer of property" within the scope of the Gift Tax Act. *See Commissioner v. Walston*, 168 F.2d 211 (4th Cir. 1948) (invalidating regulation subjecting the exercise of general power to gift tax in a case arising in 1938, because the exercise of a power by the donee of a power is not a "transfer of property" by the donee); *Commissioner v. Solomon*, 124 F.2d 86, 89-90 (3d Cir. 1941) (release of power by donee not a "transfer of property" by donee).

Congress enacted Section 2518 of the Code, referred to above, in 1976, providing a rule for disclaimers of interests created after 1976. The House Ways and Means Committee report described existing law by noting that a disclaimer "recognized for Federal transfer tax purposes . . . is not treated as a taxable transfer by the person making the disclaimer." H. Rep. No. 1380, 94th Cong., 2d Sess. 65, *reprinted in* 1976 U.S. Code Cong. & Ad. News 3356, 3419.

The Treasury Department likewise, following Congressional intent, has consistently recognized that effective disclaimers are not "transfers" subject to tax. It is clear from available early Treasury Department policy statements that the Department followed the *Brown* rule for years in gift tax cases. For example, in 1945, the Service's Chief Counsel approved a proposed letter ruling that the renunciation of a life interest in a testamentary trust, made before receipt of any benefits of the interest, "will not constitute a gift" subject to federal gift tax. RA 1 (GCM 24626 (1945)). In a later GCM, the Chief Counsel explained the basis for this rule:

> The estate and gift tax provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject.

JA 39 (GCM 27626 (Jan. 15, 1953) (citing *Brown*)).[12/]

12/ Consistent with these policy statements, the early Treasury Regulations interpreting Sections 501(a) and (b) of the Gift Tax Act nowhere mentioned disclaimers or included any examples suggesting that a refusal to accept a gift was a "transfer . . . of property" by the disclaimant. Like the detailed examples contained in the Congressional committee reports accompanying the

Randolph E. Paul, author of the definitive treatise on early federal gift tax law, who had served in the early 1940s as a senior Treasury Department policy-making official, wrote in 1946:

> Despite the breadth of the gift tax statute, it obviously does not reach a refusal to accept property, which, in effect, shifts it back to the donor or elsewhere . . . .

Randolph E. Paul, *Federal Estate and Gift Taxation* § 16.03 at 686 (1946 Supp.) (and cases cited); *see also* Charles L. B. Lowndes & Robert Kramer, *Federal Estate and Gift Taxes*, 682-83 (1956) (according to leading commentators in 1950s, gift tax treatment of disclaimers followed property law). Subsequently, the Treasury Department issued the 1958 Regulation and then the 1986 Regulation, each recognizing that effective disclaimers are not "transfers" taxable as gifts under the gift tax statute.

The Government flagrantly distorts this Court's decision in *Jewett* and the lengthy history cited above in arguing that Congress intended that all disclaimers are "transfers" subject to the gift tax. According to the Government, the Treasury Department, through its 1958 and 1986 Regulations, created a "regulatory safe harbor"

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enactment of the Gift Tax Act (*see* H. Rep. No. 708, 72d Cong., 1st Sess., 27-28 (1932), *reprinted* in 1939-2 C.B. 457, S. Rep. No. 665, 72d Cong., 1st Sess., 39-40 (1932), *reprinted in* 1939-2 C.B. 496), each of the detailed examples in the early regulations involved a transfer of property *already owned by* the taxpayer. Treas. Reg. 79, Art. 2 (1933). Subsequent regulations interpreting Sections 501 (a) and (b) of the Act and its successor provisions in the 1939 Code, issued in 1936 and 1943, similarly made no mention of disclaimers.

from tax[20] that has no grounding in Congressional intent, and *Jewett* held that "a disclaimer indirectly effects a 'transfer of property by gift' (26 U.S.C. 2501(a)) and is therefore subject to the federal gift tax." Br. 15; *see also* Br. 12, 18, 22, 28, 29. *Jewett* did not hold this. Justice Stevens wrote for the majority in *Jewett* that a disclaimer "*may* constitute an indirect gift to a successor in interest subject to federal gift tax liability." 455 U.S. at 306 (emphasis added); *see also id.* (*Jewett* presented only a "narrow question" of interpretation of the 1958 Regulation). The Congressional history discussed above shows that disclaimers are not allowed merely by the grace of the Treasury Department, but that Congress has always intended that effective disclaimers not be treated as "transfers" subject to tax.[21]

Estate of Sanford v. Commissioner, 308 U.S. 39 (1939), and *Burnet v. Guggenheim*, 288 U.S. 280 (1933), cited by the Government, Br. 18, do not support the Government's contention that all disclaimers are taxable. Those cases each involved a transfer of property already owned by the taxpayer but subject to one or more powers retained by him to control its disposition. The issue for the Court in both cases was when the transfer became

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[20] The Government attempts to bolster this contention by its repeated characterization of Judge McMillian's "safe harbor" opinion in the court below, Br. 7, 8, but that is contradicted by the opinion itself, in which Judge McMillian never used those words.

[21] The Government ignores this history to support its litigating position here, but elsewhere recently it has acknowledged and affirmed it. For example, in its brief filed in *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988), *cert. denied*, 490 U.S. 1005 (1989), the Government acknowledged that the ability effectively to refuse a gift is implicit in Section 2511 of the Code. 8th C. S. App. 6, 52. And in a recent official policy statement, the Government reiterated that effective disclaimers are not "transfers." *See* JA 75 (GCM 39858 (Sept. 9, 1991) (citing *Brown*)).

complete (and thus taxable), and the Court held that that occurred when the grantor relinquished the control he had retained. Neither case has any application to a donee's refusal to accept property, in which no control is relinquished because none has ever been acquired. *See Solomon*, 124 F.2d at 89-90 (holding that relinquishment of a power of appointment was not taxable as a gift and declining to apply *Sanford* because it was fundamental in *Sanford* that the "person with control over the property was either its owner or donor in the first instance"). Like *Estate of Sanford* and *Guggenheim*, the other cases cited by the Government, Br. 12, 15, 18, each involved a transfer of property already owned by the taxpayer.

Congress has clearly and consistently intended that a taxpayer, by disclaimer, can effectively refuse to accept a gift. The Government's interpretation of the Act and the 1986 Regulation to apply to disclaimers of pre-Act interests violates that clear and consistent intent.

2. Congress has Consistently and Repeatedly Directed that New Disclaimer Rules Are Not to be Retroactively Applied to Existing Interests.

Not only has Congress always recognized the right to disclaim, Congress has also consistently and repeatedly directed that the Act must not be retroactively applied and that new disclaimer rules are not to be retroactively applied to existing interests. The Government's interpretation of the 1986 Regulation to apply to interests created before enactment of the Act would be a retroactive application of the Act clearly contrary to Congressional intent.

Congress provided in the original Act that "[t]he tax shall not apply to a transfer made on or before the date of the enactment of this Act [June 6, 1932]." Act § 501(b). Congress adhered to this prohibition against retroactive

application of the Act in its multiple subsequent amendments to the Act, "avoid[ing] any taint of retroactivity in connection with the [gift tax]. . . ." Charles L. B. Lowndes, Robert Kramer, & John H. McCord, *Federal Estate and Gift Taxes* 643 (3d ed. 1974). Most significant here, each time that Congress has amended the gift tax statute to establish a new disclaimer rule, it has followed Section 501(b)'s mandate by applying each new rule only prospectively, to disclaimers of interests created after enactment of the new rule. Congress has correspondingly required that existing disclaimer rules continue to apply to disclaimers of interests created before enactment of the new rule. This history establishes, consistent with Section 501(b), that the effectiveness of a disclaimer for federal gift tax purposes must be measured by the rule in effect when a disclaimant's interest was created.

In the 1951 Act, when implementing the 1942 Act amendments extending the gift tax to exercises and releases of general powers of appointment, Congress provided that a disclaimer of a general power would not be treated as a taxable release of the power, 65 Stat. 94, if the disclaimer satisfied applicable property law requirements and was made within a reasonable time after knowledge of existence of the power. S. Rep. No. 382, 82d Cong., 1st Sess. (1951), *reprinted in* 1951 U.S. Code Cong. & Ad. Serv. 1530, 1534. This was the first time that Congress ever prescribed a federal timeliness requirement, in connection with state law requirements, for an effective disclaimer. Significantly, Congress applied this federal timeliness requirement prospectively, only to disclaimers of powers created after October 21, 1942 ("post-1942 powers"), the date of first enactment of the new tax rule. Powers created before enactment of the new tax rule ("pre-1942 powers") could be released at any time free of gift tax, as long as the release satisfied property law requirements. *See* Treas. Reg. § 25.2514-(2)(d). A disclaimer of a pre-1942 power satisfying property law

requirements also is tax-free, because a disclaimer is a refusal to accept property *ab initio*.22/

In 1976, when Congress enacted the new disclaimer rule in Section 2518, requiring disclaimer nine months after the "transfer creating the interest in the person disclaiming," it provided that the new rule would apply only to disclaimers of interests created after 1976, after enactment of the new rule. Pub. L. 94-455, § 2009(e)(2), 90 Stat. 1893. Similarly, when Congress amended Section 2518 in 1981, the amendments applied only to disclaimers

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22/ Although the new disclaimer rule for post-1942 powers was not enacted until 1951, Congress had grandfathered in pre-1942 powers in the 1942 Act by providing that such powers could be released tax-free at any time before January 1, 1943, and it extended that date several times until finally enacting the 1951 Act. *See, e.g.*, ch. 120, § 10, 57 Stat. 150 (example of extension of time period for tax-free release). Post-1942 powers also could be released at any time between 1942 and 1951 under these grace period provisions. Thus, the holders of general powers had ample time between 1942 and 1951 to release the powers tax-free. The 1951 Act loosened rather than tightened the new tax rules enacted in the 1942 Act, so it was unnecessary for Congress to provide any additional grandfather protection in the 1951 Act for releases of powers created between 1942 and 1951.

The tax treatment of releases of general powers is of special significance, because the Government in its brief filed in *Jewett* argued that disclaimers should be taxed like releases of general powers, 8th C. S. App. 6, 55, and the Court recognized the propriety of the analogy. 455 U.S. at 318. A release, like a disclaimer, is a relinquishment of rights. Indeed, a release can occur under property law principles even after acceptance, while a disclaimer is a refusal to accept property *ab initio*. After enactment of the 1942 Act imposing a tax on exercise of general powers, releases of pre-1942 general powers made in accordance with property law requirements remained free of gift tax. Under the analogy recognized by the Court in *Jewett*, after enactment of the 1932 Gift Tax Act imposing a tax on "transfers of property," disclaimers of pre-1932 remainder interests made in accordance with state property law requirements must remain free of gift tax.

of interests created after 1981. Pub. L. 97-34, § 426(a), 95 Stat. 318.

This history manifests Congressional intent to protect the settled expectations of donees and donors of property, by permitting a disclaimer by the donee under the rules in place when the interest was created. Such protection was warranted because the new rules, in general, have added more stringent requirements, including more stringent timeliness requirements. Application of the new rules to existing interests would unfairly upset those settled expectations.

For that reason, in *Commissioner v. Estate of Copley*, 194 F.2d 364 (7th Cir. 1952), *aff'g* 15 T.C. 17 (1950), *acq.*, 1965–2 C.B. 4, the Seventh Circuit invoked Section 501(b) to invalidate a tax on post-Gift Tax Act transfers because a critical event had occurred *before* enactment of the Act that made application of the tax unfair. *Copley* involved a husband's transfers to his wife in 1936 and 1944 totalling $1,000,000, pursuant to a 1931 antenuptial agreement. The Act imposed the gift tax on transfers for inadequate consideration, and the Commissioner sought to tax the 1936 and 1944 transfers on this basis. The court held that because the rights of Copley and his wife were fixed before enactment of the Act, it would be an unfair retroactive application of the Act to tax Copley on his 1936 and 1944 transfers.[23/] *Id.* at 366-67. Taxation of

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23/ The Government suggests that *Estate of Copley* does not "parallel" the facts of this case, because *Copley* did not face an issue whether a "gratuitous transfer by the wife after 1932" would have been subject to gift tax. Br. 20 n. 7 (emphasis omitted). This suggestion begs the question, for the issue here is whether, like the *Copley* husband's transfer of assets in 1936 and 1944 pursuant to a 1931 agreement, Mrs. Irvine's Disclaimer was an effective disclaimer for federal gift tax purposes (and, thus, nontaxable and not a "gratuitous transfer") or an ineffective disclaimer (and, thus, a transfer of property by gift). *Copley* is persuasive because it illustrates a situation in which a federal circuit court held that

Mrs. Irvine's Disclaimer would similarly be an unfair retroactive application of the Act.

The Government in the district court conceded that its application of the 1986 Regulation to Mrs. Irvine was retroactive. D. Ct. Br. 17-18. The Government in the Eighth Circuit conceded that Mrs. Irvine had no opportunity to make an effective disclaimer. But here, the Government says that because her Disclaimer was made in 1979, there is no retroactive application of the tax, and the fact that her interest was created before the Act is irrelevant. Br. 18.24/ Aside from its mischaracterization of the *Jewett* holding, that is the Government's sole

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application of the Gift Tax Act was unfairly retroactive under Section 501(b), even though the asset transfers took place in 1936 and 1944.

24/ The *en banc* court of appeals did not suggest that taxing Mrs. Irvine's 1979 Disclaimer would "apply the tax retroactively," contrary to the Government's contention. *See* Br. 17 (quoting PA 7a). To make this contention, the Government misquotes from the part of the *en banc* court of appeals opinion holding that *Lucius's* transfer creating Mrs. Irvine's interest was not a "taxable transfer" within the meaning of the 1986 Regulation, because, in part, "Congress expressed its intention not to apply the tax retroactively." PA 7a.

The Government relies on *United States v. Jacobs*, 306 U.S. 363 (1939), and several other cases to suggest that because there is no retroactive application of the "tax," the retroactive application of a federal reasonable time period must not be contrary to Congressional intent, but that reliance is misplaced. *See* Br. 19. These cases all involved constitutional challenges to tax statutes, where Congress had clearly stated its intent that the statute must be applied in the manner in which it was applied by the Government. The resolution of these cases has no bearing on the question of Congressional intent at issue here. In *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929), the Court held in favor of the taxpayer on another statutory issue in the case to avoid a construction of very doubtful constitutionality. *Id.* at 348-49.

response to the Respondents' argument based on Congressional intent. In *Estate of Copley*, 194 F.2d at 365, the Seventh Circuit rejected a similar argument made by the Commissioner ("the Commissioner in the question as posed, as well as in his brief, over-simplifies the situation"). By focusing solely on the 1979 Disclaimer, the Government ignores the retroactive application of the Act itself, a matter that it recognized in both courts below.

Congress has made its intent very clear that taxpayers have the right to disclaim property and that new disclaimer rules are not to be retroactively applied to existing interests. Under this consistent scheme, following Section 501(b)'s mandate, the effectiveness of Mrs. Irvine's Disclaimer must be measured by the disclaimer rule in effect when her interest was created, the applicable property law rule.

3. Taxation of Mrs. Irvine's Disclaimer Under the Government's Construction of the Gift Tax Act and The 1986 Regulation Would Violate Due Process.

Application of the 1986 Regulation to tax Mrs. Irvine's Disclaimer should also be rejected as a matter of statutory construction to avoid the resolution of a constitutional issue. The Government's retroactive application, without notice, would treat Mrs. Irvine, and a small number of other taxpayers whose interests were created in pre-Act transfers and whose time for disclaimer ran before enactment of the Act, differently, and much more harshly, than all other taxpayers, because they would be required to disclaim *before* enactment of the Gift Tax Act. Others whose time for disclaimer runs after enactment have notice of the Gift Tax Act and the opportunity to make an effective disclaimer. The Government's construction of the Gift Tax Act and the

1986 Regulation in this case would violate the Due Process Clause.

This Court's precedents establish the doubtful constitutionality of the Government's construction. First, a retroactive tax statute is judged under the following standard:

> [The court] must "consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." . . . One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute.

United States v. Hemme, 476 U.S. 558, 568-69 (1986) (quoting *Welch v. Henry*, 305 U.S. 134, 147 (1938)); *see also Untermyer*, 276 U.S. at 445 (holding original 1924 gift tax unconstitutional). Retroactive application of a tax statute is accorded particular scrutiny when the statute imposes a wholly new tax, as did the Gift Tax Act in 1932. *See Hemme*, 476 U.S. at 568 (upholding amendment to established tax and distinguishing *Untermyer* which held new gift tax unconstitutional). Second, an arbitrary statute that lacks any rational basis also violates due process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see also Heiner v. Donnan*, 285 U.S. 312, 331-32 (1932) (gift tax statute held unconstitutional where narrow class of taxpayers was subjected to much harsher treatment than others for no legitimate purpose). The Government has never attempted to articulate any rational basis for its arbitrary, retroactive application of

the gift tax statute in this case.25/ If the Government's construction of the Act and the 1986 Regulation were accepted, this Court would have to reach this significant due process issue. And if the Court does reach this issue, the Government's construction should be struck down as a violation of Mrs. Irvine's right to due process because she, without notice, would be taxed arbitrarily for no legitimate reason with regard to conduct undertaken years before enactment of the Gift Tax Act.

C. In the Alternative, if the 1986 Regulation Applies, This Court Should Hold that Mrs. Irvine's Disclaimer was Timely and Effective for Federal Gift Tax Purposes.

As a separate, alternative ground for affirmance, if the 1986 Regulation does apply, this Court should hold that Mrs. Irvine's Disclaimer, made within a reasonable time after termination of the Trust in 1979, was timely and effective for federal gift tax purposes. The *Jewett* majority held that the "transfer" referred to in the ambiguous 1958 Regulation meant the 1939 creation of Jewett's remainder interest, while the dissenting Justices interpreted "transfer" to mean the transfer that would occur upon trust termination. First, there are substantial reasons why "transfer" in this case should be construed to mean the 1979 Trust termination, rather than the 1917 creation of the Trust. Second, if the Court decides that *Jewett* is controlling in this case, that decision should be

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25/ Like its approach to the issue of Congressional intent, the Government dismisses any constitutional issue by focusing solely on the fact that Mrs. Irvine's Disclaimer occurred in 1979 and ignoring the retroactivity at issue. *See supra* at 30-31. None of the cases deciding constitutional questions cited by the Government, Br. 19, involved the Gift Tax Act, or retroactivity resulting in arbitrary, different treatment of similarly situated taxpayers.

reconsidered and overruled, because it was based upon erroneous information concerning the history of the 1958 Regulation and the Commissioner's interpretation of that Regulation.

1. The "Transfer" Referred to in the 1986 Regulation Should Be Construed to Mean the 1979 Trust Termination, Rather than the 1917 Creation of the Trust.

The *Jewett* majority, in determining that the "transfer" creating Jewett's interest in 1939 was the one from which to measure his time to disclaim, found it significant that the only contingency preventing Jewett from taking his fixed fifty percent share of trust principal was the requirement that he survive the life beneficiaries. *See* 455 U.S. at 318 (petitioner had "50-percent remainder interest of a trust" for twenty-four years) (*quoting* 70 T.C. at 438). By contrast, significant contingencies, in addition to survival, were present for Mrs. Irvine until Trust termination, because the number of remainder beneficiaries and the size of her interest changed considerably during the Trust term and were subject to change until Trust termination.[26/]

The Treasury Department itself, in 1966, held in a private letter ruling not before the Court in *Jewett* that the presence of a contingency in addition to a survival contingency renders effective a disclaimer made after the contingency event occurs, even though made long after

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26/ When the Trust was established in 1917, Lucius had five children aged thirteen to thirty-two and four grandchildren, including Mrs. Irvine, aged nine months to six years. The number of remainder beneficiaries grew from four to ten by 1925 , then to twelve by 1927 and fourteen by 1932. The class size decreased to thirteen by 1953 when the youngest grandchild of Lucius Ordway died without issue. JA 29.

the creation of the interest. In that private letter ruling the Commissioner allowed a taxpayer with knowledge at least since 1936 of an income interest in a trust created in 1933 to disclaim free of gift tax in 1966 when she became entitled to an additional income share. *See* JA 53 (PLR 6612201590A (Dec. 20, 1966)); *see also infra* at 42. The relevant "transfer" as the Service applied the 1958 Regulation in that ruling was the contingency event entitling the taxpayer to a greater income share, *not* the creation of her interest in 1933.

Since *Jewett*, three circuit courts of appeals, in cases involving the timeliness of a disclaimer of a survivorship interest in jointly held property, have confined *Jewett*'s definition of transfer to its facts. In these cases, the courts of appeals have held that because state property law permitted a joint tenant to sever the joint tenancy to strip the other of the survivorship interest, the relevant "transfer" for purposes of determining the timeliness of a disclaimer did not occur when the joint tenancy was created. Rather, it occurred upon the death of the husband in each case, when the contingency disappeared. Thus, disclaimer within a reasonable time after that death was timely. *See Estate of Dancy v. Commissioner*, 872 F.2d 84 (4th Cir. 1989); *McDonald v. Commissioner*, 853 F.2d 1494 (8th Cir. 1988) (lower court opinion at 89 T.C. 293, 295 n.7 indicates interest held more than thirty-four years before disclaimer), *cert. denied*, 490 U.S. 1005 (1989); *Kennedy v. Commissioner*, 804 F.2d 1332 (7th Cir. 1986) (interest held more than twenty-five years before disclaimer).[22/]

As in the 1966 letter ruling and the joint tenancy cases, important contingencies made it impossible for Mrs. Irvine to determine in the 1920s even what

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[22/] The Government gave up litigating joint tenancy disclaimer cases in 1990. 8th C. S. App. 39-40 (IRS Action on Decision CC-1990-06 (Feb. 7, 1990)).

fractional share of the Trust principal she might one day receive. Even in the joint tenancy cases, the surviving spouse knew exactly what she might one day inherit from her husband. The much more uncertain contingencies in Mrs. Irvine's case were not removed until the Trust terminated. Under these circumstances, unlike those present in *Jewett*, Mrs. Irvine's Disclaimer was timely and effective because it was made shortly after the event that caused the contingencies to disappear, the termination of the Trust.

As the dissenting Justices in *Jewett* recognized, even where only the survival contingency was present, the ambiguous 1958 Regulation, providing for a "reasonable time" and disclaimer only after "knowledge of the existence of the transfer," should be interpreted to permit disclaimer after trust termination. Justice Blackmun, writing for the dissenters, recognized the unfairness of requiring disclaimer long before the remainder interest rights ever become possessory. Because Jewett had to survive the life interest holders to ever be entitled to any share of the trust principal, the dissent recognized that "[i]t is the contingency event [of survival] that is important and makes sense in the consideration of any disclaimer." 455 U.S. at 323.[28] There

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[28] A disclaimer, the dissent noted, is "fundamentally different from a voluntary transfer of property," with which the gift tax statute is concerned. 455 U. S. at 323. A disclaimer is the exercise of a right to refuse to accept property, without exercising control or direction as to its transfer, "for that selection has been made by the trustor." *Id.* The majority referred to the disclaimant's "control" over property, *id.* at 318, but as the dissent correctly noted, a remainder beneficiary, like any disclaimant, exercises no control over property by refusing to accept it. The Government had suggested in its brief in *Jewett* this "control" existed by its misleading reliance, as in this case, on *Estate of Sanford* and *Guggenheim*, *see Jewett* Brief for the Respondent 26, cases which deal with the issue of the timing of a gift of property already owned by the donor, and are not apposite to a

is fundamental unfairness in requiring that disclaimer take place "long before the interest could ripen into enjoyment . . . at a time when the disclaimant does not know what he is disclaiming or whether he ever would receive and enjoy any interest." *Id.* at 328.29/ It is even more unfair to require Mrs. Irvine to disclaim in the 1920s, because she could not have known then the size of her ultimate share of the Trust principal.

The dissent relied upon the Eighth Circuit's sound analysis of the legal issue in *Keinath*. The Eighth Circuit there noted that "reasonable time" was not defined either in the Code or the 1958 Regulation. And the basic requirements of the 1958 Regulation, including the reasonable time requirement, "are but a codification of common law principles applicable to the doctrine of disclaimers," under which a remainder beneficiary has a reasonable time after the death of the life beneficiary within which to disclaim. *Id.* at 324 (*quoting Keinath*, 480 F.2d at 59). *Keinath* had remained the only appellate

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donee's refusal to accept property. *See supra* at 25-26.

29/ The majority had relied on the Tax Court's assertion in *Jewett* that "the passage of time is crucial to the scheme of the gift tax," 455 U.S. at 316 n.17 (*quoting* 70 T.C. at 437), for which the Tax Court, in turn, had cited no authority at all. As the dissent correctly pointed out, the Tax Court's conclusory analysis "rest[ed] on an insecure base," *id.* at 326, the 1961 decision in *Fuller v. Commissioner*, 37 T.C. 147 (1961). *Fuller* involved a disclaimant who had received the benefit of an income interest for twenty-five years before purportedly disclaiming part of that same income interest. Although the Government notes in this Court that Mrs. Irvine had received income from the Trust, Br. 3, 16 n.4, and 23, she had never accepted any portion of her remainder interest before executing her Disclaimer. The Government's own regulations recognize that, because the interests are entirely separate, receipt of trust income as a life interest holder has no effect on the ability to disclaim a remainder interest. Treas. Reg. §§ 25.2518-2(d)(1) and (4) (Ex. 1), 25.2518-3(a)(1).

court authority interpreting the 1958 Regulation for over seven years after 1973, and indeed was reaffirmed by the *en banc Cottrell* decision in 1980. *See* 455 U.S. at 323.[30] *See also* Jacob Mertens, *The Law of Federal Gift and Estate Taxation* § 34.14, at 565-66 (Interim Supp. 1974) ("reasonable time" for disclaimer of a remainder interest is governed by applicable property law and runs from death of life beneficiary, relying on *Keinath*). Congress, too, when it enacted Section 2518 of the Code, acknowledged and indicated satisfaction with *Keinath* by establishing a new effective disclaimer rule that would only apply for disclaimers of interests created in the future. Pub. L. 94-455, § 2009(e)(2), 90 Stat. 1893; H. Rep. No. 1380, 67-68, *reprinted in* 1976 U.S. Code. Cong. & Ad. News 3356, 3420 & n.4 (acknowledging *Keinath*). The dissent found unfairness in departing in *Jewett* from *Keinath*'s settled interpretation of the 1958 Regulation, on which taxpayers and their advisors had properly relied.

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[30] Indeed, *Keinath* lent stability to an area that the IRS, in 1964, recognized had caused difficulty and uncertainty for taxpayers because of the ambiguous 1958 Regulation :

> [I]t would seem that inasmuch as the Service has interjected an uncertainty it should not close its eyes to the problem. It is reasonable to assume that a person might truly prefer not to receive property from a decedent's estate, but would not disclaim if he knew that such disclaimer would cost him money out of his own pocket (by gift tax). Accordingly, the taxpayer should be entitled to know what position the Service is going to take on a given set of facts and circumstances. Otherwise, he is compelled to proceed in something of a blind fashion, not being able to determine the tax consequences primarily by reason of the fact that a state of irresolution has been wrought upon him by the Service.

GCM 32894 (Aug. 10, 1964), which did not become publicly available until the early 1980s. For the Court's convenience, Respondents have lodged a copy of this GCM with the Clerk of the Court.

The unfairness of *Jewett*'s holding, as applied to Mrs. Irvine, is dramatically apparent, because she lived in Minnesota in the Eighth Circuit, where *Keinath* was not only settled but controlling law at the time of her Disclaimer. Moreover, she had a right to disclaim that existed before enactment of the gift tax statute. The Government had announced it would follow *Keinath* in the Eighth Circuit, and Mrs. Irvine quite justifiably relied on *Keinath* in making her Disclaimer. Jewett, by contrast, disclaimed before *Keinath* was decided and had no pre-existing right to disclaim.31/ Given these equitable factors and circumstances not present in Jewett's case, this Court should conclude that Mrs. Irvine's Disclaimer made shortly after Trust termination was made within a "reasonable time" as required by the 1986 Regulation.

2. **Alternatively, *Jewett* Should Be Reconsidered and Overruled Because It Was Based Upon Erroneous Information Concerning the History of the 1958 Regulation and the Commissioner's Interpretation of that Regulation.**

If the Court nevertheless believes that *Jewett* governs here, Respondents respectfully submit that the Court should reconsider and overrule the interpretation of the 1958 Regulation adopted by the majority in *Jewett*. The Government informed the Court in oral argument that the Commissioner had "absolutely not" ever taken a contrary position regarding the meaning of the

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31/ The fact that Jewett's interest was created after enactment of the Act was critical to the Court's conclusion that Jewett had no "right" to make a disclaimer without gift tax consequences. 455 U.S. at 317; *see also* 8th C. S. App. 53-54 (excerpt from Government's brief filed in *Jewett*, arguing that taxation was proper because "Regulation did not deprive petitioner of any pre-existing right").

ambiguous 1958 Regulation. And the *Jewett* majority's belief that the Commissioner had consistently interpreted both the Code and the Regulation regarding disclaimers was integral to its decision to uphold the Government's interpretation of the ambiguous 1958 Regulation. In fact, documents that were not before the Court in *Jewett* establish that the Commissioner had not been consistent in his interpretations of either the Code or the Regulation.

As the *Jewett* majority recognized, the Commissioner's interpretation of the Code or of a regulation is entitled to respect, but only if it has been consistent. 455 U.S. at 318; *see also Rowan Cos. v. United States*, 452 U.S. 247, 258-63 (1981) (holding Treasury Department regulation invalid in part due to Department's inconsistent interpretations in published and private rulings since statute's enactment in 1935). The Court in *Jewett* did not have before it the following IRS policy statements which establish that the *Commissioner* had applied the *Brown* rule for years before issuance of the 1958 Regulation:

1. GCM 24626 (1945), *reprinted at* RA 1, approving a letter ruling holding that a renunciation of a life interest in a trust will not constitute a taxable gift.

2. GCM 27626 (Jan. 15, 1953), *reprinted at* JA 39, describing the "right which the beneficiary holds . . . to accept . . . or the equal right to reject" and stating, based on *Brown*, that "[t]he provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation."

These policy statements are consistent with the early Treasury Regulations interpreting the Gift Tax Act and

the 1939 Code, also not before the Court, which nowhere mentioned disclaimers or included any examples suggesting that a refusal to accept a gift was a "transfer of property." *See supra* at 23 n.19. The Court also did not have before it an internal Treasury Department memorandum prepared shortly before the publication of the federal gift tax regulations in proposed form in 1957, explaining that only six regulations represented "major changes" from existing regulations, all the "direct result of the enactment of the 1954 Code." A proposed regulation regarding disclaimers was not among them.[32/]

These documents strongly, if not conclusively, show that the 1958 Regulation merely was intended to continue the Treasury Department's historic position regarding disclaimers, following the *Brown* rule.[33/] This is reinforced by the fact that the Treasury Department determined to apply the 1958 Regulation retroactively to 1955 rather than prospectively. *See* Treas. Reg. § 25.0-1(a). The Treasury Department's practice during that era was to apply only prospectively any regulation or ruling changing an earlier position, if the change was detrimental to taxpayers. *See generally* Mitchell Rogovin,

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32/ The memorandum, obtained by Respondents in discovery and reprinted at RA 5, transmitted the proposed gift tax regulations to the Secretary of the Treasury for approval of publication in the Federal Register. In interpreting the 1958 Regulation, the *Jewett* majority considered a similar Treasury Department memorandum generated at the time of publication of the final gift tax regulations. 455 U.S. at 313-14.

33/ Jewett had argued in his reply brief that the 1958 Regulation was intended to "codify" the "existing common law of disclaimer as expounded" in *Brown* and *Hardenbergh*. *Jewett* Reply Brief of Petitioner 6. But what Jewett and the Court failed to appreciate is that the *Brown* rule represented both the established judicial interpretation of the gift tax statute and the established Treasury Department position.

The Four R's: Regulations, Rulings, Reliance and Retroactivity, 43 Taxes 756, 762-63, 769 (1965) (author was then IRS Chief Counsel); *see also* John S. Nolan & Victor Thuronyi, *Retroactive Application of Changes in IRS or Treasury Department Position*, 61 Taxes 777 (1983) (1983) (practice followed today as well).

The Court also was misinformed by the Government during oral argument that the Commissioner had "absolutely not" interpreted the 1958 Regulation in a manner contrary to its interpretation in *Jewett*. *See* 8th C. S. App. 6, 58–61. The 1966 letter ruling discussed above, *see supra* at 34-35, took a contrary position, holding that the "transfer" did not occur upon the creation of an income interest in a trust, but after a contingency event occurring 33 years later. This was the only ruling issued by the Commissioner up to that time interpreting the application of the 1958 Regulation to an interest in a trust, at least the only ruling that remains available. The 1966 letter ruling further reinforces the conclusion that the 1958 Regulation was intended to continue the Commissioner's historic adherence to the *Brown* rule, and suggests that the Government's position taken beginning with its litigation of *Keinath* was a new position, developed for litigation, well after the fact. In light of all of the relevant authorities, the Court should reconsider and overrule the *Jewett* majority's interpretation of the 1958 Regulation.

CONCLUSION

For the foregoing reasons, the judgment of the *en banc* Court of Appeals for the Eighth Circuit should be affirmed.

Dated: September 2, 1993 Respectfully submitted,

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Attorneys for Respondents

APPENDIX

Internal Revenue Service General Counsel's Memorandum 24626 (1945)

GC:I:GHS
A-396092

In re:

DEPUTY COMMISSIONER BLISS:

Reference is made to your memorandum of December 8, 1944, (MT-ST-RR) transmitting for review of proposed ruling with respect to whether the renunciation by * * * of her interests under the will of her deceased husband would constitute a gift under the Federal gift tax statute.

It is the view of this office that the renunciation by * * * of her interests under the will, in the absence of other material circumstances or any affirmative acts on the part of the widow [illegible] the subsequent disposition of the property involved [illegible] to establish a donative intent, would not constitute a gift. This office, therefore, is in accord with the conclusions reached in the proposed ruling letter, but it is suggested that for the purpose of qualifying the ruling as hereinabove indicated the last paragraph of the letter be rewritten to read as follows:

> Under the circumstances stated in your letters, and in the absence of other material circumstances as a part of the proposed action, if the bequest of the life estate is irrevocably renounced by * * * during the administration of her husband's estate and prior to the receipt by her of any income from the trust property, such renunciation will not constitute a gift under the provisions of the Federal gift tax act.

[illegible]
Chief Counsel
Bureau of Internal Revenue

[Document stamped "Obsolete."]

[Document stamped "This document is not to be relied upon or otherwise cited as precedent by taxpayers."]

A-396092

WT-ET-RR
* * *

Dear * * *:

Reference is made to your letters of October 27 and November 8, 1944, inquiring whether the renunciation by * * * of her interest under the last will and testament of her deceased husband would constitute a gift under the Federal gift tax statute.

* * *, the husband of * * *, died testate during the year 1944 as a resident of * * *, Texas. The last will and testament was entered for probate on July 1, 1944. Under the will and codicil the decedent's entire estate, consisting of separate property and his interest in the community estate of himself and his wife was left in trust with The * * *, as trustee, providing for the payment of the entire income to the wife, * * *so long as she may live, and for a division upon her death of the corpus equally among the daughters of the decedent and his wife, share and share alike.

It is evident that * * * is entitled, under the provisions of the will and codicil, to the income from the trust for life. You state that * * * has accepted no benefit under her husband's will, has taken no steps which would bind her to an acceptance of the will, and contemplates renouncing the bequest to her contained in the will.

If the bequest of the life estate is irrevocably renounced by * * * during the administration of her husband's estate and prior to the receipt by her of any income from the

trust property, such renunciation will not constitute a gift under the provisions of the Federal gift tax law.

Very truly yours,

[illegible] Bliss
Deputy Commissioner

[Document stamped "Obsolete."]

[Document stamped "This document is not to be relied upon or otherwise cited as precedent by taxpayers."]

Treasury Department Memorandum
Notice of Proposed Rulemaking, Regulations Relating to Gift Tax

U.S. TREASURY DEPARTMENT
WASHINGTON 25

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE
T:P:A
R-346-

MEMORANDUM FOR: Honorable George M. Humphrey
Secretary of the Treasury

SUBJECT: Notice of proposed rule making– Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

There is transmitted for your approval for publication in the Federal Register a notice of proposed rule making with respect to the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B and under certain sections of subtitle F of the Internal Revenue Code of 1954. The Gift Tax Regulations are applicable to gifts made during the calendar year 1955 and subsequent years.

The 1954 Code made comparatively few changes in the gift tax area. However, it presented an opportunity for a general revision of existing regulations which are of long standing and which are subject to clarification and elaboration in various areas.

Substantively, the proposed regulations are similar to existing regulations. The major changes are the direct

result of the enactment of the 1954 Code and may be summarized as follows:

(1)The regulations relating to the disallowance of the $3,000 exclusion with respect to gifts of future interests in property, proposed under section 2503, reflect two important changes made in the 1954 Code. First, where there has been a transfer to any person of a present interest in property (such as income for life), the possibility that the interest may be diminished by the exercise of a power will not cause disallowance of the exclusion if no part of the interest will at any time pass to any other person. Secondly, property transferred for the benefit of a minor qualifies as a present interest if specified conditions set forth in the Code are satisfied.

(2)The regulations proposed under section 2504 reflect the change made by section 2504(c) of the 1954 Code, which places a limitation on the rights of both the Government and taxpayers to revalue gifts made in prior calendar years for purposes of computing the total amount of gifts made in preceding calendar years. The 1939 Code did not contain any provision comparable to that set forth in section 2504(c).

(3)Sections 2501 and 2511 provide new rules for the taxation of gifts made by nonresident aliens. Under section 2501 the tax does not apply to gifts of intangible property made by a nonresident alien who was not engaged in business in the United States. Under section 2511 the tax applies, in the case of a nonresident alien, only to a gift of property situated within the United States, and shares of stock constitute property within the United States only if issued by a domestic corporation. Since any regulations relating to nonresident aliens under one

of these sections would be incomplete and not easily understood without reference to the regulations under the other section, the regulations relating specifically to gifts made by nonresident aliens have been combined and appear under section 2511.

(4)New regulations have been prescribed under section 2515 of the 1954 Code, which provides that, under certain circumstances, the transfer of property by one person to himself and his spouse as tenants by the entirety does not constitute a gift at the time of the creation of the tenancy, but that a gift may be made at the time the tenancy is terminated. However, a spouse may elect to treat the creation of a tenancy by the entirety as a gift, in which case the amount of the gift is determined under the general provisions of law relating to the making of gifts (generally the same as under the 1939 Code). There was no section in the 1939 Code which corresponds to section 2515. The regulations under the 1939 Code relating to the making of gifts at both the time of creation of a tenancy and at the time of its termination were limited in extent. The new regulations under section 2515 contain not only the regulations relating to the new provisions of law, but also the appropriate rules which were, in practice, applied under the 1939 Code, since upon termination of a tenancy in many cases it will be necessary to determine a portion of the value of the gift under section 2515 and the remaining portion of the gift under the general provisions of the law.

(5)New regulations have been prescribed under section 2516 of the 1954 Code which excludes from gift tax transfers made under certain property settlements. There was no corresponding section in the 1939 Code.

(6)The regulations under section 2523, relating to the marital deductions, have been expanded as a result of liberalizing changes made in the 1954 Code. A deduction is now allowed where a surviving spouse is given a legal life estate with a power of appointment over the remainder. In addition a deduction is allowed where a surviving spouse is given the right to income for life from only a portion of an interest in property plus a power of appointment over that portion of the interest.

Minor substantive changes have been made, to reflect changes made by the 1954 Code and to clarify existing regulations to facilitate administration. For the most part, the clarifying changes are based on recent court decisions and revenue rulings.

With respect to nonsubstantive matters, the proposed regulations reflect a more extensive change. The regulations have been arranged in accordance with the Code section to which they apply, in a manner similar to that followed in recent years in the issuance of income tax regulations. Many headings and examples have been added where considered helpful. Administrative regulations designed to assist donors in filing their returns and in paying the taxes shown thereon have been

incorporated in the Gift Tax Regulations.

Commissioner

Attachment

[Various initals noted]
12-14-56

Supreme Court, U.S.
FILED
OCT - 7 1993
OFFICE OF THE CLERK

No. 92-1546

In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1546

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

I. THE FEDERAL GIFT TAX APPLIES TO THE 1979 DISCLAIMER OF A REMAINDER INTEREST IN A 1917 TRUST

1. Congress designed "the gift tax statute to reach all gratuitous transfers of any valuable interest in property." *Dickman* v. *Commissioner*, 465 U.S. 330, 334 (1984). The statute is broadly written to reach gratuitous transfers of all forms of property and property interests, "however conceptual or contingent" those interests may be. *Smith* v. *Shaughnessy*, 318 U.S. 176, 180 (1943). In *Jewett* v. *Commissioner*, 455 U.S. 305 (1982), this Court held that, in view of the "expansive" scope of the statute, the gift tax "unquestionably encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust" (*id.* at 310). The Court's holding in *Jewett* applies directly to the

1979 disclaimer by Mrs. Irvine of part of her remainder interest in the Ordway Trust.

The basic premise that underlies respondents' brief (Resp. Br. 11-14), however, is that *Jewett* did *not* hold that a disclaimer is a "transfer of property by gift" within the scope of the gift tax statute (26 U.S.C. 2501(a)) and that the tax is imposed, if at all, under the terms of the 1986 Treasury regulation, which respondents claim is inapplicable to trusts created prior to enactment of the gift tax. Respondents' underlying premise rests upon a demonstrably faulty foundation.

In *Jewett*, the Court expressly relied on "the statutory language" for its conclusion that the gift tax "encompasses an indirect transfer, effected by means of a disclaimer, of a contingent future interest in a trust." 455 U.S. at 310. The court emphasized that "the statutory provisions" were the basis for "imposing a gift tax" in that case (*id.* at 317) and that "the treatment of the disclaimers as taxable gifts is fully consistent with * * * *the statutory scheme.*" *Id.* at 310 (emphasis added). The Court specifically held in *Jewett* that the statute—operating independently of the regulation—reached disclaimers and that the taxpayer in that case erred in assuming that he "had a 'right' to renounce the interest without tax consequences that was 'taxen away' by the 1958 regulation." *Id.* at 317. As the Court stated in *Jewett*, under the expansive language of the gift tax statute, the taxpayer "never had such a right." *Ibid.*[1]

---

[1] Contrary to respondents' contention, the courts of appeals have not confined this Court's holding in *Jewett* "to its facts" (Resp. Br. 35). In *Kennedy* v. *Commissioner*, 804 F.2d 1332 (7th Cir. 1986), *McDonald* v. *Commissioner*, 853 F.2d 1494 (8th Cir. 1988), cert. denied, 490 U.S. 1005 (1989), and *Estate of Dancy* v. *Commissioner*, 872 F.2d 84 (4th Cir. 1989), the courts considered whether the timeliness of a disclaimer of a survivorship interest in joint tenancy property should be measured from the creation of the joint tenancy or from the death of the cotenant. In each case, the court concluded that, since state law allowed either joint tenant to eliminate the other's right of survivorship "by partition or attachment

The general provisions of the Treasury regulations implement the broad language of the statute by providing that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax." 26 C.F.R. 25.2511-1(c)(1). As we explain in our opening brief (Br. 21-32), and as we discuss further below (pages 14-20, *infra*), in the promulgation of Treasury regulations in 1958 and in their re-promulgation in 1986, the Commissioner of Internal Revenue has recognized an exception from the expansive coverage of the gift tax for a limited category of disclaimers made within a "reasonable time" after the disclaimant first became aware of the interest. Because Mrs. Irvine's 1979 disclaimer was made 48 years after she reached the age of majority and learned of her interest in the trust, however, it plainly was not made within a "reasonable time." See *Jewett* v. *Commissioner*, 455 U.S. at 318-319. Her disclaimer thus does not come within the regulatory safe harbor and remains subject to tax.[2]

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for debts," "it is impossible to ascertain whether a cotenant has any right of survivorship until the other cotenant dies." *Estate of Dancy* v. *Commissioner*, 872 F.2d at 88. Since the survivorship interest "is created only when a cotenant dies without having partitioned the tenancy," the "reasonable time" within which the interest may be disclaimed without gift tax runs from the death of the cotenant and not from the initial creation of the joint tenancy. *Ibid.* Accord *McDonald* v. *Commissioner*, 853 F.2d at 1499-1501; *Kennedy* v. *Commissioner*, 804 F.2d at 1335-1336. None of those decisions (i) is in any manner inconsistent with *Jewett*, (ii) limits *Jewett* "to its facts" (Resp. Br. 35) or (iii) has any relevance to this case, where it is undisputed that the 1917 transfer in trust was irrevocable several decades before Mrs. Irvine's disclaimer was made (Pet. Br. 26-27 n.14).

[2] Other beneficiaries of the Ordway Trust have acknowledged that *Jewett* resolves the question whether a disclaimer of a remainder interest in a trust is subject to the federal gift tax (*Amici* Ordway Br. 6). They thus do not join in respondents' erroneous underlying premise. They contend

2. Belatedly acknowledging the applicability of *Jewett* to this case, respondents ultimately contend (Resp. Br. 40) that *Jewett* was wrongly decided. They claim that *Jewett* rests upon a mistaken deference to the Commissioner's interpretation of the Code and the regulations to require that a disclaimer be made within a "reasonable time" to escape tax. Respondents assert that, contrary to statements made by government counsel at oral argument in *Jewett*, the Commissioner had, in the past, allowed taxpayers who knew of their interest in property for *more* than a "reasonable time" to disclaim that interest free of tax (*id.* at 40-42).[3]

Respondents' assertion lacks any foundation. The very rulings and General Counsel Memoranda on which respondents rely (Resp. Br. 40-42) emphasize that, to escape taxation, the disclaimer must be made "within a reasonable time from the time that [the taxpayer] first received notice" of her interest in the property disclaimed. J.A. 55 (Priv. Ltr. Rul. 6612201590A (Dec. 20, 1966)). See also J.A. 43 (Gen. Couns. Mem. 27,626 (Jan. 15, 1953) (distinguishing a prompt disclaimer from one "wherein the legatee renounced four years after the decedent's death")).[4]

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instead that the federal gift tax may not be applied to the post-gift tax transfer of an interest in a pre-gift tax trust (*id.* at 6-7). That contention is addressed at pages 7-11, *infra*.

[3] *Amici* Halbach, et al., raised this same contention when they were parties in *Poinier* v. *Commissioner*, 86 T.C. 478 (1986), aff'd in part and rev'd in part, 858 F.2d 917 (3d Cir. 1988). The Tax Court rejected their argument, noting that *amici* were "grasping at straws." 86 T.C. at 485.

[4] The rulings on which respondents and *amici* rely are not inconsistent with the conclusion that the taxpayer must manifest his refusal to accept ownership of property within a reasonable time of learning of his interest to escape the gift tax. It is obvious that if a legatee renounces his interest in a decedent's estate the day after the decedent's will was found and read to him, as occurred in General Counsel Memorandum 27,626 (Jan. 15,

The contention that *Jewett* was based on a misunderstanding of the Commissioner's practice under the gift tax statute has twice been presented to, and rejected by, the lower courts. In *Poinier* v. *Commissioner*, 86 T.C. 478 (1986), aff'd in part and rev'd in part, 858 F.2d 917 (3d Cir. 1988), after noting that the taxpayers "are grasping at straws" (86 T.C. at 485), the Tax Court concluded that the administrative materials on which respondents now seek to rely would not have "persuaded [this Court] to reach a different conclusion in *Jewett*."

1953), the disclaimer is made within a reasonable time. See J.A. 43. General Counsel Memorandum 24,626 (1945), concerned a widow who renounced a life estate created under her late husband's will during the administration of the estate and prior to her receipt of any income from the trust. The memorandum contains no indication that the renunciation was not made within a reasonable time. See Resp. Br. RA1. And Private Letter Ruling 6612201590A, issued on December 20, 1966, involved the renunciation of an income interest in a trust that shifted to the taxpayer as a result of the death of two life beneficiaries, each of whom left an adopted son who stood to succeed to his interest. The Supreme Court of Pennsylvania held that the adopted sons were ineligible to inherit the interest. Promptly upon learning of that decision, the taxpayer, whose interest arose upon default of the life beneficiaries' issue, executed a renunciation, which was treated as nontaxable. The ruling concluded that the renunciation was made within a reasonable time. See J.A. 55. As the Tax Court stated in *Poinier* v. *Commissioner*, 86 T.C. at 485, "[w]e are satisfied that even if the Supreme Court had been aware of this private ruling to another taxpayer, it would not have been persuaded to reach a different conclusion in *Jewett*."

The Commissioner's earlier rulings thus do not support respondents' claim. Even if they had, the Commissioner is free to correct a mistaken interpretation of the law, even when doing so upsets a taxpayer's expectations. *E.g.*, *Dickman* v. *Commissioner*, 465 U.S. 330, 343 (1984); *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965); *Automobile Club* v. *Commissioner*, 353 U.S. 180, 184-185 (1957). It can hardly be contended, in any event, that any of the rulings that respondents cite had any bearing on Mrs. Irvine's decision in 1931 not to disclaim her interest in the Ordway Trust.

Ibid.[5] Similarly, in *Estate of Bunn* v. *United States*, 3 Cl. Ct. 547, 549-550 (1983), the Claims Court rejected the taxpayer's assertion that *Jewett* was "the product of a misrepresentation foisted upon the Supreme Court by government counsel in oral argument." *Id.* at 549-550. As the court noted, the rulings on which respondents seek to rely do "not reflect the inconsistency in the Commissioner's position which plaintiffs claim." *Id.* at 550.[6] To the contrary, the litigated cases reflect that the Commissioner has consistently taken the position that a disclaimer not made within a reasonable time after the taxpayer first acquires knowledge of the interest remains subject to the federal gift tax. See, *e.g.*, *ibid.*; *Fuller* v. *Commissioner*, 37 T.C. 147 (1961); *Keinath* v. *Commissioner*, 58 T.C. 352, 358-359 (1972), rev'd, 480 F.2d 57 (8th Cir. 1973); *Estate of Halbach* v. *Commissioner*, 71 T.C. 141, 146 (1978); *Cottrell* v. *Commissioner*, 72 T.C. 489 (1979), rev'd, 628 F.2d 1127 (8th Cir. 1980); *Estate of Hoenig* v. *Commissioner*, 66 T.C. 471, 477 (1976)).[7]

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[5] The ruling on which the Tax Court focused in *Poinier* was the same 1966 letter ruling that respondents invoke in their brief in this Court. See 86 T.C. at 485; Resp. Br. 42. That letter ruling addressed the question of when, on the particular facts of that case, the taxpayer first learned of the interest disclaimed. See J.A. 53-55. It did not in the slightest manner indicate any departure from the Commissioner's established requirement that, to escape the gift tax, the disclaimer must be made "within a reasonable time from the time that [the taxpayer] first received notice" of the interest to be disclaimed. J.A. 55. See note 4, *supra*.

[6] The Claims Court further noted "that Jewett's counsel likewise conceded that the Commissioner's interpretation of the regulation had been consistent." *Estate of Bunn* v. *United States*, 3 Cl. Ct. at 550.

[7] Considerations of *stare decisis* have special force in cases involving statutory interpretation. If Congress perceived any error in the reasoning of *Jewett*, it was free to correct it. See *California* v. *FERC*, 495 U.S. 490, 500 (1990). On two occasions after *Jewett* was decided, however, Congress rejected proposals to enact legislation to exempt disclaimers such as Mrs. Irvine's from the gift tax. In 1986, Congress rejected a Senate bill

3. The Court held in *Jewett* that the gift tax applies to the transfer by disclaimer of a remainder interest in a trust. 455 U.S. at 310. That conclusion is not made inapplicable to this case by the fact that the trust involved here was created before the gift tax was enacted in 1932. The transaction to which the gift tax applies is Mrs. Irvine's 1979 disclaimer, not Lucius Ordway's 1917 transfer in trust. Application of the gift tax to Mrs. Irvine's 1979 disclaimer does not result in a retroactive imposition of the gift tax, as respondents (Resp. Br. 20) and *amici* (*Amici* Ordway Br. 7) contend.

Mrs. Irvine's decision to disclaim her interest in the trust was made in 1979. There is nothing "retroactive" about imposing a tax on transfers of property that was enacted in 1932 to a transfer of property that occurred in 1979. As this Court held in rejecting a similar claim in *United States* v. *Jacobs*, 306 U.S. 363 (1939), "the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *Id.* at 366-367. See also *Fernandez* v. *Wiener*, 326 U.S. 340, 355 (1945) ("a tax upon the termination by death of a power to dispose of property, created before the enactment of the tax statute, does not offend due process"); *Reinecke* v. *Northern Trust Co.*, 278 U.S. 339, 345 (1929) (a tax is not retroactive when it applies to a transfer

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that would have exempted from gift tax a disclaimer of an interest in property created before November 15, 1958, if the disclaimer was made before December 9, 1980 (the date of the Ninth Circuit's decision in *Jewett* in favor of the Commissioner) and was made within a reasonable time after the interest vested in the taxpayer. See H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. Pt. 2, at 771 (1986). In 1984, Congress rejected a similar proprosal that would have permitted a disclaimer of a property interest created by a transfer occurring before November 15, 1958, to be made on a tax-free basis within 90 days after the date of enactment. See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 1238 (1984).

that "followed the passage of the statute"); Pet. Br. 18-19.[8] See also cases cited note 14, *infra*. The fact that Mrs. Irvine's

[8] Respondents do not squarely address or deny the obvious relevance of *United States* v. *Jacobs*, and related cases, to their claim that the statute cannot constitutionally be applied "retroactively" to a post-gift tax transfer of an interest created in a pre-gift tax trust. Instead, respondents contend only that *Jacobs* has "no bearing" on their different argument that Congress did not intend for the gift tax to be applied in this manner (Resp. Br. 30 n.24). What respondents overlook is that *Jacobs* held that Congress *did* intend to apply the estate tax, which is the precursor of the gift tax, to the "change in ownership" that occurs from events occurring after that tax was enacted. *United States* v. *Jacobs*, 306 U.S. at 367. Respondents' suggestions that the gift tax should not be applied to a post-gift tax "change in ownership" of property simply because that property was received by gift before the gift tax was enacted has no support in the statute, its history or the case law. There is nothing to suggest that Congress meant to limit the statutory phrase "transfer of property" (26 U.S.C. 2501(a)) to mean "transfer of property not received prior to this enactment by gift." The plain language of the statute, this Court's decisions in *Jacobs*, *Reinecke* and *Fernandez*, as well as common sense, all counsel against respondents' strained assertion.

The Ordway *amici* contend that *Jacobs* is distinguishable from this case because in *Jacobs* the decedent had "an opportunity *after* passage of the taxing legislation to reorder his or her affairs to avoid the tax" (*Amici* Ordway Br. 17). That purported distinction fails. Lucius Ordway, who funded the trust in 1917, is not subject to any tax. His interest in, and control over, the gift expired before the gift tax was enacted. The fact that he could no longer "reorder" his affairs merely reflects that his transfer in trust of a gift to Mrs. Irvine had become final. See *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 43-45 (1939). Moreover, Mrs. Irvine, who became aware of her interest in the trust no later than 1931, could have disclaimed her interest in the trust *before* the gift tax was enacted or, in ordering her *own* affairs, could have elected *not* to disclaim the interest thereafter. Mrs. Irvine elected instead to retain her income and remainder interest in the trust for many years and then disclaim it 47 years after the gift tax was enacted. It cannot be said that imposing a tax enacted in 1932 to a disclaimer made in 1979 is retroactive "merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." *United States* v. *Jacobs*, 306 U.S. at 367.

interest in the trust was created before 1932 does not alter the critical fact that she relinquished her interest in the trust more than four decades *after* the tax on "transfer[s] of property by gift" (26 U.S.C. 2501(a)) had been enacted. The relinquishment of a valuable property right in 1979—47 years after the gift tax took effect—is an event that gives rise to gift tax liability. See, *e.g.*, *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 43 (1939); *Burnet* v. *Guggenheim*, 288 U.S. 280, 285 (1933) (the gift tax is upon the "present transfer" of the valuable property right).[9]

Respondents point out that, when Congress enacted the new disclaimer rule in Section 2518 in 1976—requiring disclaimers to be made within nine months of the creation of the interest to escape gift tax (26 U.S.C. 2518(b)(2))—Congress provided that "the new rule would apply only to disclaimers of interests created after 1976" (Resp. Br. 28). Respondents (*id.* at 28-29) and their *amici* (*Amici* Ordway Br. 3) contend that this 1976 legislation reflects a congressional intent—which they impute back to 1932—that rules concerning the taxation of disclaimers should be applied only prospectively.

The intention of Congress in enacting amendments to the gift tax in 1976 is, of course, a feeble guide in the interpretation of the legislation it enacted in 1932. Respondents' contention, in any event, ignores the fact that, in enacting the 1976 amendments, Congress did not disturb the preexisting scheme under which disclaimers of interests created before that date

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[9] The Ordway *amici* assert (*Amici* Br. 6), without supporting authority, that application of the gift tax to Mrs. Irvine's 1979 disclaimer would violate the gift tax provision which states that "[t]he tax shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 245. Since Mrs. Irvine's transfer was made in 1979, and therefore obviously was not "made on or before" June 6, 1932, that provision has no application to this case.

remained subject to tax if the disclaimer was not made within a "reasonable time." See Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 2009(b)(1), 2045(e)(2), 90 Stat. 1893, 1894. The 1976 amendments simply replaced, for interests created thereafter, the regulatory requirement that the disclaimer occur within a "reasonable time" with the more specific criterion that the disclaimer must be made within "9 months" after the interest was created. 26 U.S.C. 2518(b)(2).[10] The history and structure of the 1976 amendments thus provide no support for respondents' contention that Congress intended the post-1932 disclaimer of interests created prior to enactment of the gift tax to escape tax.[11]

The plain language of the federal gift tax statute affords no exemption for the disclaimer of property that was in existence before 1932. Many property rights currently in existence were created before 1932. For example, in 1917, Mrs. Irvine's grandfather could have given her an interest in a house that was built in that year. If Mrs. Irvine gratuitously transferred her interest in that house after the gift tax was enacted, that transfer would unquestionably be subject to tax. In *Jewett*, 455 U.S. at 310, this Court concluded that the transfer of an interest in trust by disclaimer is, like the transfer of other forms of "property," subject to the federal gift tax. Respondents' suggestion that a remainder interest in a trust created before 1932 should be treated differently from other forms of property created before 1932 is contradicted by the plain, unqualified language of the statute. As this Court observed in *Jewett* v. *Commissioner*, in enacting the gift tax in 1932, Congress used the term "property" "in the broadest and most compre-

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[10] The interest may be disclaimed later if the disclaimant has not attained "age 21" at that time. 26 U.S.C. 2518(b)(2)(B).

[11] Moreover, Congress has now twice declined to enact legislation that would have exempted disclaimers such as Mrs. Irvine's from tax. See note 7, *supra*.

hensive sense" (455 U.S. at 309, quoting S. Rep. No. 665, 72d Cong., 1st Sess. 39 (1932), and H.R. Rep. No. 708, 72d Cong., 1st Sess. 27 (1932)).

4. Congress has found it necessary to provide special treatment for one particular type of property under the gift tax. Under Section 2514 of the Internal Revenue Code, while the release of a general power of appointment is generally subject to the gift tax (26 U.S.C. 2514(b)), the release of such a power created on or before October 21, 1942, is not subject to tax. 26 U.S.C. 2514(a). Respondents erroneously contend (Resp. Br. 28 n.22) that the gift tax treatment to be afforded to Mrs. Irvine's disclaimer should be the same as that afforded to the release of a general power of appointment created on or before October 21, 1942.

The special provisions that have been enacted for powers of appointment represent the culmination of a lengthy historical development of the estate and gift tax treatment of such powers. Prior to 1942, property over which a decedent held an unexercised general power of appointment "was held not taxable under any provisions of the estate tax law because the power did not give the decedent an interest in the property."[12] Craven, *Powers of Appointment Act of 1951*, 65 Harv. L. Rev. 55, 56 (1951), citing *Helvering* v. *Safe Deposit & Trust Co.*, 316 U.S. 56 (1942).[13] The result of that rule left the gift tax

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[12] By contrast, a contingent remainder interest is unquestionably an interest in "property" within the meaning of the gift tax (26 U.S.C. 2501(a)). *Jewett* v. *Commissioner*, 455 U.S. at 310.

[13] Prior to 1921, the Treasury took the position in Regulations 37, Art. XI 1917), that property passing under a general power of appointment was includable in the appointor's gross estate under Section 202(a) of the Revenue Act of 1916, ch. 463, 39 Stat. 777. The Court rejected the Treasury's position in *United States* v. *Field*, 255 U.S. 257 (1921), however, and held that property passing under the exercise of a general power of appointment was not subject to the estate tax under Section 202(a) because the property passing under the power was not subject to

treatment of the release of a general power of appointment uncertain (Craven, *supra*, 65 Harv. L. Rev. at 56) (citations omitted):

> The gift tax statute in force prior to the Revenue Act of 1942 contained no provision dealing specifically with property over which a power of appointment was exercised or released. The statute merely taxed the transfer of property by an individual by gift, and there was uncertainty about the effect of the exercise or release of a power of appointment. * * * There was a conflict of decisions on the effect of exercising in favor of another or giving up a power to take income or principal of a trust created by another.

In 1942, Congress concluded that the then-existing treatment of powers of appointment "has been found to be extremely inadequate in scope and an outstanding device for the avoidance of the estate tax." H.R. Rep. No. 2333, 77th Cong., 2d Sess. 160 (1942); S. Rep. No. 1631, 77th Cong., 2d Sess. 232 (1942). Congress therefore enacted legislation to require inclusion of property subject to an unexercised general power of appointment in a decedent's estate for estate tax purposes and also amended the gift tax provisions to assure conformity. Revenue Act of 1942, ch. 619, §§ 403, 452, 56 Stat. 942, 952; see Craven, *supra*, 65 Harv. L. Rev. at 58-59. The 1942 law applied the gift tax to releases of general powers of appointment without regard to whether the powers were created before of after the date of the statute. Craven, *supra*, 65 Harv. L. Rev. at 60, 61. But, in the 1942 Act, Congress provided a brief period of grace until January 1943 for the tax-free release of powers of appointment. That brief grace period was thereafter "extended by Congress ten successive times, the last

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distribution as part of the donee's estate, as the statute then expressly required. 255 U.S. at 264.

extension being made until July 1, 1951." *Id.* at 60. The series of compromises that resulted in these extensions ultimately culminated in the Revenue Act of 1951, which drew the distinction still present in the gift tax between the non-taxable release of a general power of appointment created before 1942 (26 U.S.C. 2514(a)) and the taxable release of a power created after 1942 (26 U.S.C. 2514(b)).

To be sure, as respondents point out (Resp. Br. 27), the release of a general power of appointment, like the disclaimer of a trust interest, may constitute an indirect transfer that serves as an estate planning technique. Congress recognized this fact by specifically making the release of a general power of appointment created after October 21, 1942, subject to the gift tax. 26 U.S.C. 2514(b). Although it ultimately chose not to do so, it is beyond question that Congress also could have imposed—and in 1942 did impose (subject initially to a brief grace period)—the gift tax on the release of a general power of appointment created *before* October 21, 1942.[14] The limited

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[14] In *United States* v. *Field*, 255 U.S. 257 (1921), the Court noted that no one had questioned "the power of Congress to impose a tax upon the passing of property under testamentary execution of a power of appointment created before but executed after the passage of the taxing act." *Id.* at 261-262, citing *Chanler* v. *Kelsey*, 205 U.S. 466, 473, 478-479 (1907), and *Knowlton* v. *Moore*, 178 U.S. 41, 56-61 (1900). Indeed, in the Revenue Act of 1918, ch. 18, §§ 401, 402(c), 40 Stat. 1096-1097, Congress had subjected to the estate tax property passing under a general power of appointment created before the date of enactment of the tax, and the courts subsequently upheld that provision against due process challenges. *Stratton* v. *United States*, 50 F.2d 48, 49 (1st Cir.), cert. denied, 284 U.S. 651 (1931); *Lee* v. *Commissioner*, 57 F.2d 399, 401 (D.C. Cir.), cert. denied, 286 U.S. 563 (1932). In *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 271 (1928), moreover, the Court rejected a due process challenge to a Massachusetts inheritance tax provision imposing a tax upon the succession to property subject to an unexercised general power of appointment created before the statute's passage, stating that "[s]o long as the privilege of succession has not been fully exercised it may be reached

and express exemption eventually afforded for pre-1942 general powers of appointment in Section 2514 plainly represents a matter of political compromise and legislative grace.

Congress has enacted no such exemption for disclaimers. There is no basis for respondents' contention that Congress, though silent on the subject, intended by implication in 1932 to provide the same treatment for disclaimers that was expressly provided in 1951 for powers of appointment. See also note 12, *supra*. When Congress enacted Section 2518 in 1976, it was for the purpose of making express and more specific the rules for taxation of disclaimers that had been developed administratively and in the case law under the 1932 Act. Moreover, Congress has at least twice rejected proposals to provide a "grace period" for the tax-free disclaimer of interests created in earlier years. See note 7, *supra*. Respondents' invocation of the different treatment ultimately afforded to general powers of appointment under estate and gift tax legislation has no bearing on the taxation of disclaimers for, "absent an express exclusion from its provisions, any transfer meeting the statutory requirements must be held subject to the gift tax." *Dickman* v. *Commissioner*, 465 U.S. at 335 n.4.

II. THE FEDERAL GIFT TAX REGULATIONS DO NOT EXEMPT THE DISCLAIMER INVOLVED IN THIS CASE FROM TAX

The gift tax regulations, as promulgated in 1958 and as repromulgated in 1986, set forth the general rule that the gift tax reaches "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of

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by the tax." As the Court later noted in *Chase National Bank* v. *United States*, 278 U.S. 327, 336 (1929), although *Saltonstall* involved a succession tax, rather than an estate tax, its holding applies equally to the federal estate tax. See also Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 954 (1939).

the means or device employed." 26 C.F.R. 25.2511-1(c)(1). Under the broad language of the regulations, as well as under the comprehensive provisions of the statute itself, the disclaimer of a contingent future interest in a trust represents an "indirect transfer" of property to which the gift tax applies. See *Jewett* v. *Commissioner*, 455 U.S. at 310. The 1986 version of the regulations, like the 1958 version that was before the Court in *Jewett*, however, provides a limited exception, or safe harbor, under which a disclaimer "does *not* constitute a gift if two conditions are met" (455 U.S. at 310 (emphasis added); see 26 C.F.R. 25.2511-1(c)(2)): (i) "the disclaimer must be effective as a matter of local law" (455 U.S. at 316); and (ii) "the disclaimer must be made within a reasonable time" (*ibid.*). Since Mrs. Irvine's disclaimer was not made within a reasonable time, her disclaimer remains subject to tax. See *id.* at 318-319.

Respondents do not seriously contend that Mrs. Irvine—who waited 48 years after she became aware of her interest to disclaim it—can qualify her disclaimer under the "reasonable time" requirement of the regulation.[15] Respondents instead contend (Resp. Br. 14-20) that, due to the particular wording of the 1986 version of the regulations,[16] that regulatory excep-

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[15] Respondents suggest (Resp. Br. 33-39) that her disclaimer could be regarded as within a "reasonable time" of the death of the last of her senior relatives, when the remainder became a present, rather than a future, interest. It is perfectly clear, however, that *Jewett*—which addressed the question whether the "reasonable time" provided by the regulation runs from "the creation of petitioner's remainder interest" or from "the vesting of that interest" (455 U.S. at 311)—directly rejects respondents' contention. See *id.* at 318.

[16] The 1986 version of the regulation was not in force when Mrs. Irvine made her disclaimer in 1979. Instead, the 1958 version involved in *Jewett* was in effect at that time. We do not dispute, however, that the 1986 version of the regulations should be applied in this case. See Pet. Br. 21 n.8. Respondents err in asserting (Resp. Br. 20) that it is imper-

tion can not possibly apply to the disclaimer of any property acquired through a pre-1932 gift. For the reasons to be discussed, that contention is in error. But when an *exception* from a tax is unavailable, the obvious result is then that the tax is due. Respondents' contention is therefore unavailing in any event.

1. Both the 1958 and the 1986 versions of the regulation provide an exception from the gift tax for a disclaimer made "within a reasonable time after knowledge of the existence of the transfer." 26 C.F.R. 25.2511-1(c)(2); *Jewett* v. *Commissioner*, 455 U.S. at 311. The introductory language of this paragraph of the 1986 regulation, however, adds a phrase that was not present in the 1958 regulation. It limits the coverage of the regulation to "taxable transfers creating an interest in the person disclaiming made before January 1, 1977" (26 C.F.R. 25.2511-1(c)(2)).[17]

Respondents assert that the 1986 regulation does not apply to Mrs. Irvine's disclaimer because the interest she disclaimed was created in a pre-1932 gift that was not a "taxable transfer."[18] The term "taxable transfer" in the amended regulation,

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missible "retroactively" to apply the 1986 regulations to this transaction. (Of course, if the 1958 regulation were applied instead, respondents' contentions concerning the effect of the safe-harbor regulation would be precluded by this Court's decision in *Jewett*.) An amended regulation that interprets a statute "is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129, 135 (1936).

[17] This language was adopted to conform the 1986 regulations governing the disclaimer of pre-1977 interests with the language of the regulations adopted at the same time under 26 U.S.C. 2518, governing the disclaimer of post-1976 interests. See Pet. Br. 24 n.12.

[18] Respondents' argument is not limited to pre-1932 gifts of remainder interests in trusts. It could apply equally to the disclaimer of any property acquired through a pre-1932 gift because, in respondents' view, such

however, is defined by the regulation to refer merely to a transfer that is a completed gift "regardless of whether a gift tax is imposed on the completed gift." 26 C.F.R. 25.2518-2(c)(3).[19] As the court held in *Ordway* v. *United States*, 908 F.2d 890 (11th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991), under these regulations, a "taxable transfer" occurs "whenever there happens 'any transaction in which an interest in property is gratuitously passed or conferred upon another,' even if that transaction was not subject to the gift tax." 908 F.2d at 895, quoting 26 C.F.R. 25.2511-1(c)(1).[20] See also Pet. Br. 26-27; Pet. App. 18a (McMillian, J., dissenting). Because the transfer in trust to Mrs. Irvine in 1917 represented a

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property was not acquired in a "taxable transfer." If, for example, a taxpayer was given a remainder interest in real estate in 1931, and the life tenant did not die until 1991, under respondents' view, if the remainderman were permitted by state law to disclaim his interest in 1991, it would pass to his successors without tax.

[19] The suggestion of the Ordway *amici* that the phrase "taxable transfer" is a "term of art" (*Amici* Ordway Br. 21) that is defined in 26 U.S.C. 2501 is not correct. That phrase is defined in the 1986 regulations, not in the statute. Although the statute to which *amici* refer contains the heading "taxable transfers," the text of that provision contains no mention, must less any definition, of that term. The term "taxable transfer," as used and defined in the manner described in the 1986 regulations to refer to a "completed gift" (26 C.F.R. 25.2518-2(c)(3)), was given the same meaning in legislative materials issued upon enactment of Section 2518 in 1976. See Pet. Br. 24 n.12.

[20] Respondents attempt to make much of a citation error that occurred in the quotation of language from the *Ordway* decision that appeared at page 26 of our opening brief. At that point of our brief, having quoted and properly cited the same language from the *Ordway* decision that appears in text here, the brief then repeated part of the language of that quotation and cited the regulation and not the court's opinion as the source. While we regret this inadvertent error, respondents overreact by contending that we have "misleadingly" (Resp. Br. 15) described these authorities to the Court. In any event, we take this opportunity to correct the error.

completed gift, and therefore a "taxable transfer" within the meaning of the 1986 regulations, her 1979 disclaimer was not made within a "reasonable time" of that transfer and does not qualify under the regulatory safe harbor.

2. Even if, as respondents contend, Mrs. Irvine's disclaimer were not within the ambit of the regulatory exception from the gift tax, that would not assist her. 26 C.F.R. 25.2511-1(c)(2) creates an *exception* to the otherwise comprehensive scope of the gift tax. If Lucius Ordway's 1917 transfer in trust was not a "taxable transfer" under that safe-harbor regulation, then her disclaimer is subject to the general rule of the statute and the regulation that "any transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax." 26 C.F.R. 25.2511-1(c)(1). Under this general rule, Mrs. Irvine's long-delayed disclaimer is subject to tax as an "indirect transfer" that reduced "the expected size of [her] taxable estate and [conferred] a gratuitous benefit upon the nature objects of [her] bounty" (*Jewett* v. *Commissioner*, 455 U.S. at 310).[21] Absent the regulatory exception, the disclaimer is taxable under the general rule. See *Dickman* v. *Commissioner*, 465 U.S. at 335 n.4.

Respondents err in contending (Resp. Br. 19) that if the 1986 regulation's exemption for disclaimers made within a "reasonable time" does not apply to this case, the taxability of Mrs. Irvine's disclaimer must then be determined simply by whether her disclaimer was valid under state law. The premise of respondents' argument is that the decision in *Jewett* was based solely upon an interpretation of the 1958 regulation. For the reasons discussed above (pages 1-3, *supra*), that con-

[21] Because Mrs. Irvine enjoyed the income from the trust for at least 13 years before she sought to disclaim her interest, the conclusion that her disclaimer is subject to the gift tax would be reached under the reasoning of the dissent, as well as the majority, in *Jewett*. See Pet. Br. 15-16 n.4.

tention is not correct. See *Jewett* v. *Commissioner*, 455 U.S. at 310. As the Court explained in *Jewett*, the passage of time is crucial to the scheme of the gift tax, and a disclaimer that satisfies state law concerns does not satisfy the federal concern that the delayed relinquishment of an interest in valuable property can serve as a testamentary substitute and effect a gratuitous transfer that is an appropriate subject of taxation. *Id.* at 310, 318. See also Pet. Br. 31-32. In urging that state law should control, respondents simply fail to acknowledge that the Court in *Jewett* expressly held that a disclaimer constitutes an "indirect transfer" of property that is subject to tax under the comprehensive provisions of the gift tax statute (455 U.S. at 310).

There is also no merit to respondents' contention that *Jewett* should not be applied "retroactively" to Mrs. Irvine's disclaimer. Respondents assert (Resp. Br. 37-29) that since her disclaimer was made in 1979—before this Court decided *Jewett* in 1982—she was entitled to rely upon the Eighth Circuit's decision in *Keinath* v. *Commissioner*, 480 F.2d 57 (1973).[22] In *Jewett*, however, the Court expressly rejected the

[22] Respondents' theory of detrimental reliance is factually insubstantial. If Mrs. Irvine had *not* disclaimed her interest in 1979 (subjecting it to the gift tax), it would have remained part of her estate and been subjected to the estate tax upon her death in 1987. Due to the unified nature of the gift and estate tax, the effect of the disclaimer was to somewhat accelerate, not materially alter, the tax consequences of the dispositions of her wealth. By contrast, if respondents' theory were accepted, Mrs. Irvine would obtain a substantial windfall, for the property would escape tax completely: if the rejected rule of *Keinath* were applied, her disclaimer would escape the gift tax in 1979 and the estate tax would be inapplicable because the property was no longer part of her estate at her death.

Moreover, Mrs. Irvine could hardly have "relied" upon *Keinath* (which was decided in 1973) during the prior 42 years when she was aware of her trust interest and did not disclaim it. By 1979, when Mrs. Irvine belatedly decided to make her disclaimer, the regulations containing the

decision in *Keinath* and held that the disclaimer of a remainder interest in a trust represents a taxable gift. See 455 U.S. at 317 n.19. Reliance upon an erroneous appellate decision does not immunize a taxpayer from the tax laws. *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294-295 (1970) (per curiam).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1993

"reasonable time" requirement were 21 years old and the Tax Court had already decided *Jewett* in the Commissioner's favor. Throughout this period, the Commissioner continued to litigate the issue until it was authoritatively resolved by this Court in *Jewett*. All taxpayers, including Mrs. Irvine, were of course on notice that the reasoning of *Keinath* could be rejected by this Court. Respondents therefore err in asserting that application of *Jewett* to her disclaimer is "unfair" and "inequitable" (Resp. Br. 39). See *Estate of Bunn* v. *United States*, 3 Cl. Ct. 547, 550 (1983).

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No. 92-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,
Petitioner,

vs.

JOHN O. IRVINE and
FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF ESTATE OF HELEN W. HALBACH, LOIS W. POINIER, EXECUTRIX, AND THE TRANSFEREES OF MRS. HALBACH'S DISCLAIMER, LOIS W. POINIER AND W. PAGE WODELL, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

UNITED STATES OF AMERICA,

Petitioner,

vs.

JOHN O. IRVINE and
FIRST TRUST NATIONAL ASSOCIATION,

Respondents.

BRIEF OF ESTATE OF HELEN W. HALBACH, LOIS W. POINIER, EXECUTRIX, AND THE TRANSFEREES OF MRS. HALBACH'S DISCLAIMER, LOIS W. POINIER AND W. PAGE WODELL, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST AND RULE 37 COMPLIANCE

This brief of *amici curiae* is being filed pursuant to Rule 37 of the Supreme Court Rules of Practice and Procedure on behalf of the Estate of Helen W. Halbach, Lois W. Poinier, Executrix, and the Transferees of the assets disclaimed by Mrs. Halbach, Lois W. Poinier and W. Page Wodell. The Halbach Estate has litigated with Petitioner the issue of when a disclaimer of a trust remainder interest is timely, so as to avoid imposition of federal gift tax. *See Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978), and 40 T.C.M. 952 (1980). Although the Estate's rights to challenge the imposition of tax have expired, the undersigned counsel for the amici is an

experienced practitioner in this field and has advised many clients about disclaimers and estate tax and gift tax issues, and thus has an interest in seeing that the issue raised in this case is decided properly due to the impact it may have on future cases. *See, e.g., Poinier v. Commissioner*, 86 T.C. 478 (1986), *aff'd*, 858 F.2d 917 (3d Cir. 1988), *cert. denied*, 490 U.S. 1019 (1989). In addition, the undersigned commenced an action under The Freedom of Information Act against the Internal Revenue Service to order the production of certain agency records relating to the history of Treas. Reg. § 25.2511-1(c). *O'Connor v. Internal Revenue Service*, File No. 80-0495 (U.S. District Court for the District of Columbia). Copies of written consents by both parties to the filing of this brief have been filed with the Office of the Clerk of the Supreme Court.

SUMMARY OF ARGUMENT

Jewett v. Commissioner, 455 U.S. 305 (1982), should be reconsidered because the majority opinion in that case rests upon erroneous facts concerning the history of the Treasury Regulation at issue, Treas. Reg. § 25.2511-1(c), and the Commissioner's interpretation of that Regulation. Several very significant documents were not before the Court in *Jewett*, and they shake the fundamental underpinnings of the majority opinion. These documents show: (1) the Regulation, contrary to the conclusion stated in the majority opinion, 455 U.S. at 315-16, was intended to codify the rule set forth in *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), and properly capture the distinction, based on differences in applicable state property law, between the results in *Brown* and in *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952), and was not intended to impose a new federal "reasonable time" standard for disclaimers; (2) the Internal Revenue

Service, which had followed the *Brown* and *Hardenbergh* rules, considered issuing a proposed 1956 Revenue Ruling which would have deviated from the *Brown* rule, and determined that a change, if any, should be applied only prospectively; and (3) contrary to the representation of the counsel for the Commissioner during the oral argument in *Jewett* that the Commissioner had consistently interpreted and applied the Regulation and the majority opinion's reliance on that representation, 455 U.S. at 318, the Commissioner has most emphatically not consistently applied the Regulation, and in fact in 1966 allowed a taxpayer, who had knowledge of an income interest in a trust for many years, to disclaim that interest free of gift tax.

A reexamination of *Jewett* is essential in light of these newly discovered documents. If this Court does not arffirm the judgment of the *en banc* court of Appeals on the first two grounds urged by Respondents, amici respectfully assert that, for the reasons asserted by the petitioner in *Jewett* and the dissenting opinion in that case, and for the reasons asserted by the Respondents in this case, *Jewett* was wrongly decided and should be overruled.

CASE LAW AND REGULATORY BACKGROUND

For many years, the established gift tax disclaimer rule was that a disclaimer valid, timely, and effective under local property law was effective for federal gift tax purposes. This rule had its genesis in the *Brown* case, decided by the United States Court of Appeals for the Sixth Circuit in 1933. The Sixth Circuit reasoned that there was no requirement under Ohio law that a disclaimer be made within any particular period of time to be valid, so long as it was made before an actual distribution of property to the disclaimant. That court then held that the disclaimer therein was valid under

Ohio law, that the disclaimer simply constituted the exercise of a right to reject receipt of property rather than the transfer of property, and that the disclaimer therefore was not a "transfer" for Federal estate tax purposes.1/ Subsequent to *Brown*, the Internal Revenue Service never publicly disagreed with that decision.

No other decision bearing upon this issue arose from 1933 until 1952, when the Eighth Circuit decided *Hardenbergh*. The decedent in *Hardenbergh* had died intestate, and, under Minnesota law, the property vested in the heirs immediately upon the death of the decedent. In *Hardenbergh*, the Eighth Circuit followed the *Brown* rule and determined whether the disclaimer at issue was to be treated as a transfer of property for federal gift tax purposes by looking to state property law. Because Minnesota law did not recognize disclaimers of intestate interests which had immediately vested, the Eighth Circuit accordingly held that an effective disclaimer could not be made of such interest for federal gift tax purposes. *Hardenbergh* thus followed *Brown*, but carefully distinguished it on the basis of the testate-intestate state law difference. 198 F.2d 66.

The Internal Revenue Service (then known as the Bureau of Internal Revenue) frequently considered the disclaimer issue after 1952 in connection with several proposed revenue rulings, proposed Treasury regulations and the final Treasury Regulation issued in 1958. This Court was apprised of some of that material in the *Jewett* case, in an amicus brief submitted by the undersigned, based upon the government's response to a Freedom of Information Act Request I had made. However, several

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1/ The federal estate and gift taxes are *in pari materia* and must be construed together, *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939), and the concept of "transfer" has been interpreted in the same manner under each tax. *See, e.g., Estate of Halbach v. Commissioner*, 71 T.C. 141 (1978).

very significant documents and Service comments were not before the Court in *Jewett*. These materials recently and inexplicably first became available during this litigation, well after 1982.

The first of these documents is a General Counsel Memorandum ("G.C.M.")2/ in which the Office of the Chief Counsel of the Service discussed the federal gift tax rules applicable to disclaimers at length. *See* Appendix 1 (G.C.M. 27626 dated Jan. 15, 1953). The G.C.M., after agreeing with a proposed ruling letter's conclusion that the Service not continue in its efforts to assert gift tax liability in that case, recommended that the proposed ruling be revised to set forth the Chief Counsel's reasoning, as follows:

> The estate and gift tax provisions of the [Internal Revenue] Code do not contemplate the taxing of testamentary gifts by renunciation. *Brown v. Routzahn*, 63 F.(2d) 914, (CA-6,1933), cert. denied, 290 U.S. 641. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject. *Brown v. Routzahn, supra*. When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation, the devise never takes effect, title never vests in the devisee, and such renunciation is effective as of the date of the death of the testator. *Perkins v. Isely*, [32 S.E.2d 588 (N.C. 1945)].

2/ G.C.M.s are widely circulated throughout the Service as statements of general policy. *Taxation with Representation Fund v. Internal Revenue Service*, 646 F.2d 666, 669-71 (D.C. Cir. 1981).

The Commissioner's position was thus that beneficiaries hold the "right" to accept or reject a gift of property, the *Brown* rule governed and disclaimers that satisfied state property law requirements would be effective for federal gift tax purposes. Significantly, the G.C.M. does not mention an independent federal "reasonable time" standard at all.

The second of these documents is an unnumbered G.C.M. issued three years later. *See* Appendix 2 (unnumbered G.C.M. dated May 2, 1956). In that document, the Chief Counsel commented on a proposed change of the Commissioner's position in a draft Revenue Ruling on the gift tax treatment of disclaimers, which the Commissioner was considering for publication. The proposed Ruling would have resulted in a reversal of the Commissioner's acceptance of the *Brown* rule by treating *all* disclaimers as subject to federal gift tax. *See* Appendix 6. But the Chief Counsel rejected this and made clear that the gift tax treatment at that time depended solely on state law. The Chief Counsel further directed the Assistant Commissioner to delete prefatory language in the proposed Ruling stating, "Since this Ruling represents a change in policy." The Chief Counsel reasoned that reference to a "change in policy" would make it appear that the Service "discriminated against *Hardenbergh* and [*William L. Maxwell*, 17 T.C. 1589 (1952)] by asserting a gift tax against them several years prior to its adoption of the position it successfully argued in their cases." This document indicates that the Service rested solidly on *Brown* and that any change in the Service's position would be given only prospective effect.

The third of these documents is a December 1956 memorandum from the Commissioner to the Secretary of the Treasury concerning proposed gift tax regulations. *See* Appendix 3. In that memorandum, the Commissioner acknowledged that the 1954 Code "made comparatively few changes in the gift tax area." However, the

Commissioner felt that "it presented an opportunity for a general revision of existing regulations which are of long standing and which are subject to clarification and elaboration in various areas." The memorandum then listed and summarized the "major changes." No mention at all was made concerning disclaimers.

These new documents place the documents that were before the Court in *Jewett* in an entirely different light. A May 25, 1956 transmittal memorandum[3/] for a proposed Revenue Ruling (probably the same one discussed in the unnumbered G.C.M.), *see* Appendix 5, states that, since the Ruling involved Section 7805(b) of the Internal Revenue Code, which allows the Commissioner to make rules and regulations prospective only in effect, the Commissioner had to approve it for publication personally, and the memorandum states that it accordingly had to be cleared with the Technical Planning Division before it could be resubmitted to the Commissioner for approval.

The proposed Ruling itself, *see* Appendix 6, did not mention a "reasonable time" standard but proposed that any renunciation of an inheritance or legacy under a will constitutes a taxable "transfer" for gift tax purposes, regardless of property law title considerations. The Ruling states, however:

> [U]nder the authority contained in Section 7805(b) of the Internal Revenue Code of 1954, the *ruling set forth herein will not be applied retroactively* with respect to such renunciation which became absolute and

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3/ This and the other materials described below come from the Treasury Department file for the Regulation in issue, which were obtained under a Freedom of Information Act request made by the undersigned. *See* Appendix 4.

irrevocable prior to _____, the date of this Bulletin.

Appendix 6 (emphasis added).

This proposed Ruling was "inconsistent" with a regulation then being drafted under the 1954 Internal Revenue Code, which put the Service in a "peculiar position." *See* Appendix 7 (Handwritten note of Erskine H. Hatfield). Accordingly, the Service determined to withhold publication of the Ruling pending promulgation of the final gift tax regulations, and explained the reasons for this determination in a detailed and lengthy memorandum. *See* Appendix 8. (In fact, the proposed Ruling never was issued.) In particular, the Service noted its lengthy history of following the *Brown* and *Hardenbergh* rules and the potential unfairness in changing its position, and inserted language in the proposed gift tax regulations "adopting the rules in these two court decisions." *See* Appendix 8. This memorandum was written sometime between May 25, 1956, *see* Appendix 7, and October 11, 1957, when the final version of the memorandum (which omitted most of the substantive comments contained above) was typed. *See* Appendix 9. A member of the Service's Legislation and Regulations Division, Office of Chief Counsel, who listed changes to be made in the final draft of the regulation, stated, "the renunciation rule should not depend on testacy v. intestacy," another indication that the Service's proposed regulation was codifying the *Brown* and *Hardenbergh* rules, not adopting a new federal timeliness standard. *See* Appendix 10.

The Commissioner's final official analysis of the disclaimer regulation, set forth in a Technical Memorandum dated October 1, 1958, also confirms that the regulation was "intended to be the application of the rules in [*Brown*] and [*Hardenbergh*]". *See* Appendix 11 (full citations omitted). After it received protests, the

Service "reconsidered [its] position and now believe that the proper distinction between these two court cases *turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property* which passed from the decedent." *See* Appendix 11 (emphasis added). In addition, the Service "abandoned the position that a partial renunciation cannot be made, and [the Regulation] has been further changed to recognize a partial renunciation *where it is effective, as such, under local law.*" *See* Appendix 11 (emphasis added). As set forth below, I believe that all of these documents demonstrate that the Regulation was intended to codify *Brown* and *Hardenbergh* and not impose a new "reasonable time" standard.

The most significant document not before the Court in *Jewett* is a private letter ruling issued on December 20, 1966. *See* Appendix 12 (Private Letter Ruling 6612201590A). In that letter ruling, the Commissioner allowed a taxpayer, who had knowledge of her income interest in a trust for many years, to disclaim an additional income interest free of gift tax. The Service issued no known rulings at all, of which the tax bar is aware, concerning a disclaimer of a future interest in a trust, and certainly no adverse rulings, before it issued this 1966 ruling. This is powerful evidence that the Commissioner has not consistently interpreted and applied the Regulation, and it discredits the representation made to this Court in *Jewett* by counsel for the Commissioner.

ARGUMENT

If the Commission's interpretation of Treasury Regulation § 25.2511-l(c) is deemed by this Court to apply to Mrs. Irvine's Disclaimer, and if this Court is considering whether to apply *Jewett* to her Disclaimer, it is respectfully submitted that the *Jewett* decision should

be carefully reconsidered and overruled for several reasons.

First, the centerpiece of the majority opinion in *Jewett* is its conclusion that the Regulation imposed a two-part test for a valid disclaimer, including whether the disclaimer was valid under state law and whether a new federal timeliness standard was satisfied. 455 U.S. at 310-11. The majority found the Regulation ambiguous and looked to the history of the Regulation in reaching this conclusion. But the complete history of the Regulation, which was not before the Court in *Jewett*, shows that the Commissioner intended only to codify the *Brown* rule.

The newly discovered private letter ruling and G.C.M., Appendices 1 and 2, show that the Service adhered to and accepted *Brown* as governing law. The G.C.M. confirms that the Service, at the very time it was circulating the proposed Regulation internally, was concerned about any change in policy and would have made any change reversing the *Brown* rule only prospective. These facts lend powerful additional importance to the Service's repeated comments that the proposed Regulation was intended only to codify the long-accepted rule of *Brown*. The Service's decision to eliminate the testacy-intestacy distinction found in the proposed Regulation was based on its recognition that *Hardenbergh* merely applied the *Brown* rule, further confirmation that the final Regulation codified *Brown*. *See* Appendices 8, 10, 11.

These newly discovered documents, read in conjunction with the other documents concerning the history of the Regulation, also show that the speculation in *Jewett* that a separate "federal timeliness requirement was added in response to the particular facts presented by [*Brown*], in which the taxpayer waited eight years to renounce the interest and did so when he was 72 years old," 455 U.S. at 316 n. 17, is unsupported. Rather, the Service fully accepted *Brown* as the governing rule and

recognized that *Brown* required only that a disclaimer be effective under state law to be effective for federal gift tax purposes.

The Regulation itself repeats the "local law" requirement, unencumbered by any additional "reasonable time" requirement, many times. Only once does it even mention that, "a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer," Treas. Reg. § 25.2511-1(c), but that comment is immediately followed by the requirement that "the refusal must be unequivocable [sic] and effective under the local law." The reading of the Regulation by *Jewett*'s majority focuses improperly on a single comment and elevates it to a new federal standard.4/ The Service certainly did not think it was imposing a new requirement when it drafted the Regulation; rather, it was trying to codify *Brown* and *Hardenbergh*, which made the effectiveness of disclaimers for federal gift tax purposes hinge directly and solely on state property law. The thrust of *Jewett* -- that a new federal timeliness requirement was added by the Regulation -- is thoroughly defeated by the complete history of the Regulation that is now available to the Court.

Second, the majority in *Jewett* also relied upon the fact that " [t]he Commissioner's interpretation of the regulation has been consistent over the years and is entitled to respect." 455 U.S. at 318. The majority found this fact to be a "canon of construction . . . even more

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4/ To the extent the Regulation does impose any "reasonable time" requirement, courts should look to relevant state law in giving content to that requirement, *see, e.g., Keinath v. Commissioner*, 480 F.2d 57, 61-62 (8th Cir. 1973), and, even if the Commissioner has imposed such a new requirement, it should be given only prospective effect. *See infra* at 16-17; *see also* Appendix 2.

forceful when applied to the Commissioner's interpretation of his own regulation." *Id.* (citation omitted). It based its conclusion upon a representation made before this Court during the oral argument by the counsel for the Commissioner that the Regulation had been consistently interpreted and applied.5/

The representation by the Commissioner's counsel and the resulting majority conclusion are demonstrably wrong. The Commissioner in fact in 1966 allowed a taxpayer with knowledge for many years of an income interest in an irrevocable trust to disclaim a portion of her interest free of gift tax. The Service had not previously addressed the issue at all, but in the 1966 ruling, the settlor

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5/ QUESTION: Mr. Smith, when was it first made as clear as can be that the regulation means or meant what you now say it means?

* * *

QUESTION: Well, do you think you've answered my question or not?

* * *

QUESTION: But the first part of my question was when did it become perfectly clear that the Commissioner administered the regulation the way he is now administering it?

MR. SMITH: I can't answer that question because of the paucity of cases. I suppose it became perfectly, absolutely clear with authority when the Tax Court decided the Keinath case * * *

* * *

QUESTION: *At least the Commissioner didn't change his mind.*

MR. SMITH: *Absolutely not.*

Appendix 13 (Transcript of oral argument in *Jewett*), pp. 43-45 (emphasis added).

of the trust6/ had established an inter vivos irrevocable trust on December 7, 1933. Net income was payable to his daughter during her life. The daughter died on January 4, 1936, survived by four children, all of whom received one-quarter of the trust's income from 1936 on. One son died on April 17, 1963, the other died on March 16, 1964, and each son was survived by an adopted son, which raised the question whether an adopted child qualified as "issue" so as to be able to receive income under the trust. The Supreme Court of Pennsylvania ruled, in 1966, that the adopted sons were not entitled to benefits under the trust. This ruling had the effect of increasing the income interest to which the surviving daughters were entitled following their brothers' deaths.

After that decision, one of the daughters advised the trustee that she wished to disclaim her interest in the trust. The Service, in Private Letter Ruling 6612201590A, issued December 20, 1966, stated:

> [T]axpayer's proposed renunciation will not result in a taxable transfer of that interest for gift tax purposes to her natural children if such renunciation is executed within a "reasonable time" *from the time that she first received notice of the right to the additional income interest*. If the *proposed* execution is executed at the *present* time, the execution would be effected within a "reasonable time" . . .

See Appendix 12 (emphasis added).

6/ The Pennsylvania Supreme Court opinion referred to in the Ruling yields additional information about the transaction in question (including such things as the settlor's name). *See Fownes Trust*, 421 Pa. 476 (1966); *In Re Deed of Trust of Henry C. Fownes*, 465 Pa. 182 (1975).

This disclaimant clearly knew for at least thirty years that she was a beneficiary under the trust as she had been receiving income from it since 1936, she knew of the interests held by her sister and brothers in the same trust, and she had been given notice of the prior four accountings under the trust.7/ She undoubtedly knew for many years of her contingent right to an additional income interest should one or both of her brothers die without issue. It is absolutely clear that she knew about her contingent interest to additional income upon the death of her brothers (and in fact litigated the issue over the adopted children to the Supreme Court of Pennsylvania so she would become entitled to that interest) for *over three years* before she disclaimed it, from the commencement of litigation in October 1963 to the Pennsylvania Supreme Court's decision on December 20, 1966. Nevertheless, the Commissioner held that the reasonable time period did not begin until the decision of the Pennsylvania court determining that the additional income interest in the trust would not go to the adopted sons of her brothers.

The facts surrounding the 1966 Letter Ruling made quite clear that the disclaimant exercised "control" over the property that she disclaimed, within the interpretation of "control" of the majority opinion of this Court in *Jewett*. After the Pennsylvania Supreme Court's decision became final, and thus after the disclaimant was sure under that decision how the property that she disclaimed would pass, the disclaimant executed her disclaimer. This is exactly the type of "wait and see", exercise of control planning which the Tax Court and this Court's majority opinion admonished against in *Jewett*.

7/ If the position the Commissioner took in *Jewett* applied here, she would have been required to disclaim her interest, at the latest, within a short time after 1936.

See 455 U.S. at 318-319. The Commissioner, in the 1966 Letter Ruling recognized, however, as did the dissent in *Jewett*, that "[t]here is nothing unfair or improper," *id.* at 325, in waiting until the Pennsylvania court decision was rendered and then to decide whether to accept or reject the additional income interest.

The implications of this ruling are accordingly enormous. How could the Commissioner have contended before this Court that the Regulation had been consistently applied? How can the Commissioner argue that a Regulation like this, and the Commissioner's interpretation of that Regulation, ought to be given deference and respect by the courts? How can the Commissioner even suggest, as he did in the briefing before this Court in *Jewett*,[8/] that a disclaimer made shortly after the 1958 Regulation change would have been more defensible, since that argument assumes that the Regulation was clear enough to put taxpayers on notice that the standard had changed to what the Commissioner now says it is? The 1966 Letter Ruling shows that the Commissioner's position under this Regulation has been inconsistent and unfair to taxpayers. When the Commissioner has interpreted a Regulation inconsistently, or when his interpretation is contrary to all prior interpretations, his interpretation is entitled to no weight. *Rowan Cos. v. United States*, 452 U.S. 247, 261-63 (1981). And it leaves *Jewett*, which found the Commissioner's allegedly consistent interpretation of the Regulation "forceful," unsupported.

Third, the complete history and the ambiguity of the Regulation, coupled with the Service's own inconsistency in interpreting the Regulation, demonstrate that the Commissioner's failure to apply the Regulation

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8/ Brief for the I.R.S. at 38-39, *Jewett v. Commissioner*, 455 U.S. 305 (1982).

with only prospective effect constitutes an abuse of his discretion under Section 7805(b) of the Code. That Section states, "The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive *effect*" (emphasis added). In Section 7805(b), Congress "confirmed the authority of the Commissioner to correct any ruling, regulation, or Treasury decision retroactively, but empowered him, in his discretion, to *limit retroactive application to the extent necessary to avoid inequitable results*." *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 184 (1957) (emphasis added; reference omitted).

The history of the Regulation now available to the Court makes clear that the Commissioner, at the time the Regulation was drafted, intended that any new rule that differed from *Brown* be only prospective in effect. Any new interpretation of the Regulation, whether caused by *Jewett* or by the Commissioner's failure to draft the Regulation so as to make clear he only intended to codify *Brown*, should also be only prospective in effect. By construing the Regulation as he has in *Jewett* and in this case, contrary to the intent of the drafters of the Regulation and contrary to his construction in 1966 for at least one taxpayer with a pre-existing interest, the Commissioner has abused his discretion in violation of Section 7805(b). The fact that the Commissioner apparently did not appreciate in 1958 that the Regulation changed the law certainly does not excuse a failure to avoid arbitrarily changing the law for holders of pre-existing interests. The *Jewett* majority opinion dismissed the retroactivity argument on the basis that a "right" to disclaim free of tax was not established by *Jewett*, but that reading ignores the Service's lengthy prior acceptance of *Brown* and the injustice of how this change in the law was handled; if one accepts that the law should not be changed in the middle of the game, without even notifying the players of the change, then that is sufficient

to invoke Section 7805(b) under the authorities cited above, because Section 7805(b) was intended to "avoid inequitable results." 9/

A holder of an interest from 1931, when *Brown* was first decided in the district court, through November 15, 1958, could reasonably and correctly have believed that a disclaimer of such interest permitted under state law would not incur a federal estate or gift tax. It was reasonable for taxpayers to have relied on *Brown* and to have structured their affairs accordingly. The Commissioner has unilaterally changed the rules in the middle of the game for holders of interests created before 1958, contrary to any reasonable notion of equity or justice. The application of the Commissioner's present interpretation of the Regulation to disclaimers of pre-1958 interests is unfair and constitutes an abuse of the Commissioner's discretion under Section 7805(b).

Finally, the Regulation is merely an "interpretative" regulation that, given the circumstances set forth above, is entitled to little, if any weight. This Court has stated that:

> The weight of such [informed administrative interpretative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control.

9/ Furthermore, even the Commissioner realized during the course of preparation of the Regulation that relief was appropriate under Section 7805(b), as evidenced by the invoking of such relief by a proposed Revenue Ruling. *See* Appendix 6.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); *accord, Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-145 (1976); *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *Daughters of Miriam Ctr. for the Aged v. Mathews*, 590 F.2d 1250, 1258, 1263 (3d Cir. 1978). These cases make clear that the taking of an inconsistent position by an administrative agency severely undercuts the weight to be given to an interpretative regulation; indeed, inconsistency appears to be the primary factor to be weighed in this regard. The Commissioner was *completely inconsistent* in the 1966 Letter Ruling with his present litigation position. And the Commissioner was obviously inconsistent in the Regulation, if it has the meaning this Court accepted in *Jewett*, with his prior position of following *Brown*. In addition, that Regulation was inept in its attempt to codify *Brown*, as the litigation which has resulted demonstrates. Thus, although Treasury regulations generally are given consideration and weight by the courts, given the unusual circumstances surrounding this Regulation, and in particular the 1966 Letter Ruling, the Regulation is entitled to no weight.

The Service itself has perhaps said it best:

> [T]he taxpayer should be entitled to know what position the Service is going to take on a given set of facts and circumstances. Otherwise, he is compelled to proceed in something of a blind fashion, not being able to determine the tax consequences *primarily by reason of the fact that a state of irresolution has been wrought upon him by the Service.*

G.C.M. 32894 (August 10, 1964) (emphasis added) (not publicly available at the time *Jewett* was decided).

It is insufficient to say that the Regulation applies only to disclaimers made after 1958, rather than disclaimers of interests created after 1958, since under the Commissioner's present interpretation of the Regulation holders of pre-1958 interests were unfairly and unjustifiably prevented from ever disclaiming without incurring a gift tax, once the Regulation had been promulgated. Congress recognized this very distinction when it made Section 2518 applicable only to disclaimers of interests created after 1976; that Section is inapplicable to disclaimers made after 1976 of interests created before 1977. *See* Section 2009(e) of the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520. Only the approach taken by Congress effects a change in disclaimer tax law without adversely affecting prior transactions undertaken in reliance upon then-existing law. *Cf. United States v. Byrum*, 408 U.S. 125, 134-135 (1972).

The taxability of pre-1976 interest disclaimers should be decided under the rule of *Brown*, as the drafters of the 1958 Regulation intended. *See* Appendices 8, 10, 11. This is one of the infrequent turning points in the evolution of an issue where a bold, critical reevaluation of position by this Court makes sense. Even more, justice would be rendered.

CONCLUSION

Amici respectfully submit that, if this Court does not affirm the judgment of the Eighth Circuit *en banc* on the first two grounds set forth by Respondents, this Court

should reconsider and overrule *Jewett* for the reasons set forth above.

Dated: September 2, 1993 Respectfully submitted,

Geoffrey J. O'Connor
Suite 320
600 Old Country Road
Garden City, New York 11530
(516) 228-8118

Attorney for Amici Curiae

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APPENDIX 1

Internal Revenue Service General Counsel - Memorandum 27626 (Jan. 15, 1953)

C:BRIEF
A-454559

In re: * * *

CHIEF COUNSEL
BUREAU OF INTERNAL REVENUE

NORMAN A. SUGARMAN
Assistant Commissioner (Technical)

Attention: *Head, Technical Rulings Division*

Reference is made to the proposed ruling letter (IT:AP:CA:STC:CB) addressed to the Internal Revenue Agent in Charge, * * * Such letter, submitted for review, concludes with the statement:

> "It is * * * believed that the Bureau should not continue in the efforts to assert gift tax liability in this case."

While this office is in agreement with the conclusion reached in the proposed letter, it is not in entire agreement with the reasoning used in reaching such conclusion. Accordingly, it is suggested that the proposed letter be revised to read substantially as follows:

> "Reference is made to your letter of March 23, 1951, Bureau letter of August 16, 1951, and your letter of

May 26, 1952. A conference was held in this office on July 10, 1952, the alleged donor being represented by * * * and * * *

"During the course of the conference, counsel for the estate submitted memoranda, and an affidavit executed by * * * The affidavit states that the alleged donor made the following declaration when the will was read to him on the day it was found:

> "I have got more than I can attend to. I don't want to be worried about settling the estate and I don't want any of * * * property. Do I have to take it?"

"Upon being advised by counsel that he could renounce any and all rights he had under the will, * * * on August 9, 1946, the day after the will was discovered, filed an instrument of renunciation with the probate court having jurisdiction over the administration of testator's estate. Such document read as follows:

"Whereas * * * late of the county of * * * is dead, leaving a last will and testament dated the 18th day of September 1924, which will named * * * as executor; and whereas under the terms of said will the bulk of the estate of said * * * was willed, given and bequeathed unconditionally to * * * and whereas said will was made many years ago and since said time conditions have changed;

"I, the said * * * do hereby renounce my right to qualify as executor under said will in favor of * * * and request you to appoint said * * * as administrator of the estate of * * * with will annexed; and further believing it to be the wishes of my said nephew * * *

for his brothers and sisters to eventually inherit his property, I therefore renounce my rights to inherit under said will or to receive any benefits under said will, and I specifically decline and refuse to receive any of the estate of said * * * under said will, to the end that his brothers and sisters may inherit the residue of his estate directly from him just as if he had died intestate as to the residue of his estate that was devised to me, and I hereby request the court and the administrator to settle the estate of * * * in accordance with the terms of his will except that as to such parts of his estate that I would have inherited shall pass direct to the heirs of * * * just as if he had died intestate as to the residue of his estate, it being my desire and wish that his brothers and sisters shall immediately inherit direct from him all real and personal property, subject only to his specific bequests in total amount of * * * as specifically provided in his will. The consideration for this is my love and affection for my nephews and nieces referred to.

"Witness my hand and seal this 9th day of August 1946.

* * * (SEAL)'

"On August 12, 1946, the appropriate probate court decreed that—

"* * * so much of said will as left any property to * * * is null and void and of no effect to pass title to any property real or personal or mixed of the estate of * * * / * * *

'all of said property of * * * except the specific devises of a total amount of * * * shall descend to

and be distributed between the heirs at law of * * * just as if said * * * had died intestate as to the residue of his estate.'

"Counsel stated that the alleged donor was an uncle of the decedent * * * that they had been business associates, and that neither left a wife nor children. Counsel submitted, also, a chart showing the heirs of the decedent * * * and those of the alleged donor, their relationship to each heir and the amount inherited. This chart shows eleven persons who were heirs and natural objects of the bounty of both decedent * * * and the alleged donor, and thus received benefits as a result of the renunciation. There is shown, also, three persons who were the heirs of the decedent * * * but not heirs of the alleged donor. Those persons benefited by the renunciation, of course. There is shown, as well, ten persons who were the heirs of the alleged donor, but not heirs of the decedent * * *. They were the natural objects of the alleged donor's bounty, and because of his renunciation, lost potential interests in property. In other words, this case is not the type wherein a renunciation causes property to pass to the natural objects of the bounty of decedent * * * who are the same natural objects of the bounty of the alleged donor.

"In *Perkins v. Isley*, 32 S.E. (2) 588, a North Carolina case, it is held that renunciation of a bequest is not a conveyance requiring the signature of the spouse of the party renouncing. The court said: 'The right to denounce a devise or legacy is a natural one and needs no statutory authorization. An heir at law is the only person, who, by the common law, becomes the owner of land without his own agency or consent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But

in the case of descent, the law casts the title upon the heir. 3 Washburn, 5th Ed.Sec. 4, p. 6.'

"It is therefore believed that the Bureau should not [continue in its efforts to] assert gift tax liability in this case. Such conclusion is founded on principles of law to the effect that the rights in the renounced property here stem from the will, the instrument of transfer, and not from the decedent * * * who renounced, nor from the * * * laws of succession. *Harris v. Commissioner*, 340 U.S. 111 (1950); *Ianthe B. Hardenbergh, supra*. The object of a renunciation or disclaimer under a will is not to transfer property, but to prevent a particular transfer of property. *In re Myer's Estate*, 238 P.2d 597 (1951). A transfer of property can be made only by an instrument adapted to that purpose. *In re Myer's Estate, supra*. The estate and gift tax provisions of the Code do not contemplate the taxing of testamentary gifts by renunciation. *Brown v. Routzahn*, 68 F. (2d) 914, (CA-9, 1953), cert. denied, 290 U.S. 641. The right which the beneficiary holds is the right to accept such bequest or devise or the equal right to reject. *Brown v. Routzahn, supra*. When a devisee accepts a devise, his title relates back to the death of the testator, but when there is a renunciation, the devise never takes effect, title never vests in the devisee, and such renunciation is effective as of the date of the testator. *Perkins v. Isley, supra*.

"The cases of *William L. Maxwell*, 17 T.C. No. 196 and *Ianthe B. Hardenbergh*, 17 T.C. No. 166, aff'd, 198 F. (2d) 63 (CA-8, 1952) involved instances of renunciation of an inheritance rather than a legacy, bequest, or devise. The question at issue in the *Maxwell* case arose in the state of California as did the question *In re Kalt's Estate*, 108 P. 2d 401, cited in Bureau letter of August 16, 1951. However, the *Kalt* case can be distinguished on its facts, wherein the

legatee renounced four years after the decedent's death, and admittedly took such action to defeat claims of his judgment creditors.

"The papers transmitted with your letter of May 26, 1952 are enclosed herewith. There is transmitted, also, the affidavit of * * * four memoranda submitted by counsel, and the chart previously referred to. You are requested to return these enclosures when they have served their purpose in your office."

The administrative file is returned herewith.

/s/Charles W. Davis
CHARLES W. DAVIS
Chief Counsel
Bureau of Internal Revenue

Internal Revenue Agent in Charge

* * *

Dep. Comr. McLarney

* * *

Reference is made to your letter of March 23, 1951, Bureau letter of August 16, 1951, and your letter of May 26, 1952. A conference was held in this office on July 10, 1952, the donor being represented by * * * and * * *.

The estate submitted several memoranda, also an affidavit of * * *. The affidavit is to the effect that the donor's real reason for the renunciation was, not that he desired the testator's heirs to receive the property, but that he already had more property than he could attend to, did not want to be worried about the estate and did not want any of the testator's property; that his counsel prepared the necessary documents and inserted language not actually necessary. Counsel also stated that the donor was decedent's uncle, that they had been business associates and that neither left any wife or children.

The Maxwell case, 17 T.C.—No. 169, and the Hardenberg case, 17 T.C. 166, recently affirmed, were instances of renunciation, not of a devise, bequest or legacy, but of an inheritance, which feature was emphasized by the Court. It might be noted that the Maxwell case arose in California from which State arose the Halt case, 106 Pac. (2) 401, cited in Bureau letter of August 16,1951, which holds contrary to the weight of authority.

It is probable that the question is not one of local law, but Perkins v. Isley, 32 S.W. (2) 588, a North Carolina case, holds that a renunciation of a bequest is not a conveyance requiring the signature of the spouse of the party renouncing. The Court said: "The right to renounce a devise or legacy is a natural one and needs no statutory authorization. 'An heir at law is the only person, who, by the common law, becomes the owner of land without his own agency or consent. A title by deed or devise requires the assent of the grantee or devisee before it can take effect. But in the case of descent, the law casts the title upon the heir. He cannot disclaim if he would.' 3 Washburn, 5th Ed., Sec. 4, p. 6."

At the conference counsel submitted a chart showing the heirs of the testator and those of the donor, the relationship to each and the amount inherited. This chart shows eleven persons who were heirs of both the testator and donor. They were the natural objects of the bounty of both the testator and the donor and benefited by the renunciation. There are also shown three persons who were the heirs of the testator but not of the donor and they of course benefited by the renunciation. There are also shown ten persons who were the heirs of the donor but not of the testator. They were the natural objects of the donor's bounty but did not benefit, in fact lost, by the renunciation. In other words, this is not the case as is sometimes found, of the renunciation causing the passing to the natural objects of the parties renouncing.

As you are undoubtedly aware, there are often facts which may be technically immaterial but may have a psychological effect. For example, assume a case where there is a specific bequest to A and residuary bequest to his children. A's renunciation causes his bequest to fall into

the residue, thus benefiting the natural objects of his bounty. Assume another case in which as a result of the renunciation the property passes, not to the natural objects of the bounty of the renouncing party, but to the natural objects of the testator's bounty. In the former case the renunciation has much more the appearance of a gift than in the latter case. In this case the renunciation benefits some persons who were the natural objects of the bounty of both parties and some who were the natural objects of only the testator's bounty, and there are some persons who were the natural objects of the donor's bounty but would not benefit but in fact lost as a result of renunciation. These facts may or may not be material, but very probably would have at least a psychological effect. A case in which the parties benefited by the renunciation are the natural objects of the bounty of the renouncing party, would be a better case to take into court. Also, on the power of appointment theory, there is some question as to whether the renunciation was an exercise or release of the power. The Bureau's case would be stronger had the power been created after the 1942 Act, and the renunciation after May 31, 1951.

It is therefore believed that the Bureau should not continue in its efforts to assert gift tax liability in this case. This is not to be taken as indicating an opinion that the position taken in Bureau letter of August 16, 1951, was incorrect. There is considerable basis for assertion of gift tax liability on three grounds: (1) That, even under general rules and under property law, renunciation is a gift; (2 that, assuming that for general purposes or purposes of property law renunciation is not a gift, it is a gift for Federal gift tax purposes; (3) that renunciation was an exercise of a power of appointment. The only reason for the Bureau's action in this case is that it is believed advisable to wait for a better case to get into court.

The papers transmitted with your letter of May 26, 1952, are herewith enclosed. There are also transmitted the affidavit of * * * four memoranda submitted by counsel and the chart. You are requested to return these enclosures when they have served their purpose in your office.

Deputy Commissioner

Enclosure

APPENDIX 2

CC:I:CAL
A-499687

In re: Legacy, Renunciation of

JUSTIN F. WINKLE

Assistant Commissioner (Technical)—

Attn: *Chief, Bulletin Branch*

Reference is made to the proposed Revenue Ruling relative to the Federal gift tax consequences of a renunciation, release or relinquishment by a legatee or divisee under a will or by a beneficiary under a policy of insurance. With the exception of the last two paragraphs, the proposed Revenue Ruling is substantially identical to the Revenue Ruling suggested by this office in G.C.M. 29032, dated August 16, 1955.

In a memorandum (T:R:EG:CP) dated December 6, 1955, the Director, Tax Rulings Division suggests omission of the term "bona fide" appearing in the next to last paragraph and headnote of the Revenue Ruling, and omission of the phrase "Since this Ruling represents a change in policy" at the beginning of the last paragraph. This office concurs in these suggestions, and recommends further omission of the phrase "which would have been considered a gift before the date hereof" appearing at the end of the proposed Revenue Ruling. It is believed that the use of such language is inadvisable since there has been no published Ruling announcing the previous position of the Service in this area. Furthermore, the Service has in the past indicated a policy

of asserting a gift tax in respect to certain renunciations of legacies by assuming such a position in *Hardenbergh v. Commissioner* (C.L.-8, 1952) 198 F. 2d 63, aff'g. 17 T.C. 166, and *William L. Maxwell* (1952) 17 T.C. 1589. Unless the proposed Revenue Ruling were to be revised to contain a lengthy discussion of the differences between the local law involved in those cases and the local law involved in Examples 1 and 2, any "change of policy" language might make it appear that the Service discriminated against *Hardenbergh* and *Maxwell* by asserting a gift tax against them several years prior to its adoption of the position it successfully argued in their cases. While omission of the phrases indicating that there has been a "change in policy" may leave some question as to why the Service has chosen not to apply gift tax liability retroactively in two of the cases described in the Revenue Ruling, it would seem preferable to omit such references than to be forced to discuss in the Revenue Ruling the numerous and complex problems of local law pertinent to the previous positions adopted by the Service in this area.

(Signed) John Potts Barnes
LAS
JOHN POTTS BARNES
Chief Counsel
Internal Revenue Service

CALipoitz:ls
4/30/56

APPENDIX 3

U.S. TREASURY DEPARTMENT
WASHINGTON 25

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE
T:P:A
R-346-

MEMORANDUM FOR: Honorable George M. Humphrey
Secretary of the Treasury

SUBJECT: Notice of proposed rule making--Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

There is transmitted for your approval for publication in the Federal Register a notice of proposed rule making with respect to the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B and under certain sections of subtitle F of the Internal Revenue Code of 1954. The Gift Tax Regulations are applicable to gifts made during the calendar year 1955 and subsequent years.

The 1954 Code made comparatively few changes in the gift tax area. However, it presented an opportunity for a general revision of existing regulations which are of long standing and which are subject to clarification and elaboration in various areas.

Substantively, the proposed regulations are similar to existing regulations. The major changes are the direct

result of the enactment of the 1954 Code and may be summarized as follows:

(1) The regulations relating to the disallowance of the $3,000 exclusion with respect to gifts of future interests in property, proposed under section 2503, reflect two important changes made in the 1954 Code. First, where there has been a transfer to any person of a present interest in property (such as income for life), the possibility that the interest may be diminished by the exercise of a power will not cause disallowance of the exclusion if no part of the interest will at any time pass to any other person. Secondly, property transferred for the benefit of a minor qualifies as a present interest if specified conditions set forth in the Code are satisfied.

(2) The regulations proposed under section 2504 reflect the change made by section 2504(c) of the 1954 Code, which places a limitation on the rights of both the Government and taxpayers to revalue gifts made in prior calendar years for purposes of computing the total amount of gifts made in preceding calendar years. The 1939 Code did not contain any provision comparable to that set forth in section 2504(c).

(3) Sections 2501 and 2511 provide new rules for the taxation of gifts made by nonresident aliens. Under section 2501 the tax does not apply to gifts of intangible property made by a nonresident alien who was not engaged in business in the United States. Under section 2511 the tax applies, in the case of a nonresident alien, only to a gift of property situated within the United States, and shares of stock constitute property within the

United States only if issued by a domestic corporation. Since any regulations relating to nonresident aliens under one of these sections would be incomplete and not easily understood without reference to the regulations under the other section, the regulations relating specifically to gifts made by nonresident aliens have been combined and appear under section 2511.

(4) New regulations have been prescribed under section 2515 of the 1954 Code, which provides that, under certain circumstances, the transfer of property by one person to himself and his spouse as tenants by the entirety does not constitute a gift at the time of the creation of the tenancy, but that a gift may be made at the time the tenancy is terminated. However, a spouse may elect to treat the creation of a tenancy by the entirety as a gift, in which case the amount of the gift is determined under the general provisions of law relating to the making of gifts (generally the same as under the 1939 Code). There was no section in the 1939 Code which corresponds to section 2515. The regulations under the 1939 Code relating to the making of gifts at both the time of creation of a tenancy and at the time of its termination were limited in extent. The new regulations under section 2515 contain not only the regulations relating to the new provisions of law, but also the appropriate rules which were, in practice, applied under the 1939 Code, since upon termination of a tenancy in many cases it will be necessary to determine a portion of the value of the gift under section 2515 and the remaining portion of the gift under the general provisions of the law.

(5) New regulations have been prescribed under section 2516 of the 1954 Code which excludes from gift tax transfers made under certain property settlements. There was no corresponding section in the 1939 Code.

(6) The regulations under section 2523, relating to the marital deductions, have been expanded as a result of liberalizing changes made in the 1954 Code. A deduction is now allowed where a surviving spouse is given a legal life estate with a power of appointment over the remainder. In addition a deduction is allowed where a surviving spouse is given the right to income for life from only a portion of an interest in property plus a power of appointment over that portion of the interest.

Minor substantive changes have been made, to reflect changes made by the 1954 Code and to clarify existing regulations to facilitate administration. For the most part, the clarifying changes are based on recent court decisions and revenue rulings.

With respect to nonsubstantive matters, the proposed regulations reflect a more extensive change. The regulations have been arranged in accordance with the Code section to which they apply, in a manner similar to that followed in recent years in the issuance of income tax regulations. Many headings and examples have been added where considered helpful. Administrative regulations designed to assist donors in filing their returns and in paying the taxes shown thereon have been incorporated in the Gift Tax Regulations.

Commissioner

Attachment

APPENDIX 4

Washington, DC 20224

Person to Contact:
Mr. L Kirschner
Telephone Number:
(202) 566-4912
Refer Reply to:
TX:D:F:2 78-570
Date: Jul 25 1979

Mr. Geoffrey J. O'Connor
Burke & Burke
30 Rockefeller Plaza
New York, NY 20020

Dear Mr. O'Connor:

This is in further response to your July 21, 1978, Freedom of Information Act request for documents underlying the issuance of Treasury Decision 6334.

We are pleased to enclose selected materials from the files which you requested. We regret that we cannot provide you with the remainder of materials underlying the preparation of T.D. 6334. The materials are considered to be subject to the attorney-client and governmental privileges and are exempt from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. 552 by subsection (b)(5). We have also excised a portion of one of the documents and deleted its enclosures. This information is denied as it is considered to be exempt from the disclosure requirements in accordance with 5 U.S.C. 552(b)(3) since it constitutes return information which is specifically exempted by statute (26 U.S.C. 6103).

The enclosed Notice 393 describes the above cited exemptions and sets out the appeal procedures.

Sincerely yours,

(Signature Illegible)
Chief
Freedom of Information
Branch

Enclosures
Notice 393
Selected Documents regarding T.D. 6334

BEST AVAILABLE COPY

APPENDIX 5

	SYMBOLS	FLOOR	INITIALS
1. Technical Planning Division (Attention: Mr. Littleton)	T:P	4050	DATE
2.			DATE
3. CM-952 RECEIVED MAY 28			DATE
4.			DATE
5. TECHNICAL PLANNING DIVISION			DATE

FOR:

- ☐ Approval
- ☐ As requested
- ☐ Call me
- ☐ Correction
- ☐ Filing
- ☐ Full report
- ☐ Handle directly
- ☐ Immediate action
- ☐ Initials
- ☐ Necessary action
- ☐ Note and return
- ☐ Recommendation
- ☐ See me
- ☐ Signature
- ☐ Your comment
- ☐ Your information
- ☐ _____
- ☐ _____
- ☐ Prepare reply for signature of _____

Answer or acknowledge before _____

REMARKS: Control File No. M-311
Proposed Revenue Ruling
Re: Director of Internal Revenue
[redacted]

The attached file contains a ruling under the 1954 Code which is proposed for publication in advance of the regulations. Since it involves section 7805(b) of the Code it requires the Commissioner's approval for publication. It was inadvertently forwarded for the Commissioner's signature before submitting it to your office in accordance with established procedures for clearance with the Treasury Dept. Your consideration of the file is now requested. An early reply will be appreciated.

FROM: H. J. Knoch
Chief, Bulletin Branch

DATE: 5/25/56

(Use reverse side if necessary)

APPENDIX 6

Part 1

Section 2501. - Imposition of Tax

Rev. Rul.

A renunciation, release or relinquishment by a legatee or devisee under a will or by a beneficiary under a policy of insurance constitutes a transfer of property or property rights or interests subject to Federal gift tax under Chapter 12 of the Internal Revenue Code of 1954.

The Internal Revenue Service has recently received inquiries concerning the effect, for gift tax purposes, of State or local law respecting title to the property in cases of renunciations, releases and relinquishments of inheritances and legacies. Three typical cases concerning such transactions are stated below.

1. *A*, a residence [*sic*] of Texas, was legatee under the will of a decedent who died while domiciled in Texas. *A* renounced the bequest and the surrounding circumstances did not indicate that this act was a device or subterfuge to pass title or economic benefits to any particular person or persons.

2. *B*, a residence [*sic*] of North Carolina, was legatee under the will of a decedent who died while domiciled in North Carolina. Immediately on learning of the decedent's death, *B* renounced his legacy. Inquiry as to the persons who, as next to kin, might possibly benefit from such a renunciation disclosed that there were some persons who were heirs and natural objects of the bounty of both the decedent and the taxpayer, and they received benefits as the result of the renunciation; that there were other persons who were heirs of decedent, but not of the taxpayer, and those persons also benefited by the renunciation; and that there were other persons who were not the heirs of the decedent, but who were the heirs of the taxpayer, and who, because of the renunciation, lost potential interests in property.

3. *C*, a resident of New York, took out a life insurance policy payable to his wife, but retained the power to change the beneficiary during his lifetime. Subsequently, he and his wife were divorced, but he failed to exercise the power to change the beneficiary. *C* has since died and the wife remarried and refused to accept the proceeds of the policy. In order that the executor could collect the proceeds for the estate, the wife renounced her rights under the policy and released any claims which she might have against the insurance company.

Section 2501(a) of the Internal Revenue Code of 1954 imposes a tax "on the transfer of property by gift * * *." Sections 2511(a) of the Code states that "the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *."

Section 86.2(a) of Regulations 108, which is made applicable to the Internal Revenue Code of 1954 by Treasury Decision 6091, C.B. 1954-2, 47, states that the tax will be imposed "whether the transfer is in the trust or otherwise, whether the gift if direct or indirect, and whether the property is real or personal, tangible or intangible" and that "all transactions whereby property or property rights or interest are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax." Section 86.8 of the same regulations states that "transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts * * *."

Whether or to what extent the transaction in each of the three cases stated above is subject to the tax imposed by section 2501(a) of the Code does not depend upon title to the property being held by the party at the time he executes the renunciation, release or relinquishment. As was stated in *Burnet v. Murray Guggenheim*, 288 U.S. 280, Ct. D. 636, C.B. XII-I, 374 (1933), "Taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid." In that same case, the court also said, "Congress was aware that what was of the essence of a transfer had come to be identified more nearly with a change of economic benefits that with technicalities of title."

In view of the foregoing, it is held that a renunciation, release or relinquishment by a legatee or devisee under a will, or by a beneficiary under a policy of insurance, constitutes a transfer of property or property rights or interest subject to Federal gift tax under Chapter 12 of the Internal Revenue Code of 1954.

With respect to such transactions as are set forth in examples 1 and 2 above, it has been concluded that, under the authority contained in section 7805(b) of the Internal Revenue Code of 1954, the ruling set forth herein will not be applied retroactively with respect to such renunciation which became absolute and irrevocable prior to _____, the date of this Bulletin. The non-retroactive effect of this ruling will not apply to any purported renunciation as set out in transaction 3 above.

APPENDIX 7

... a problem
position with respect to
this case. Wish you would
consider it from the
viewpoint of whether we
should send a short memo
to the effect that the proposed
revenue ruling is inconsistent
with proposed legislation, or
whether we should discuss it
with Mr. Tillotson for the
purpose of suggesting a discussion
with Mr. Keech.

ERSKINE H. MATFIELD

BEST AVAILABLE COPY

APPENDIX 8

OFFICE MEMORANDUM

UNITED STATES GOVERNMENT

T:P:A
CM-952

TO: Director, Special Technical Services Division
Attention: Chief, Bulletin Branch

FROM: Director, Technical Planning Division

SUBJECT: Proposed Revenue Ruling Relating to Section 2501 of the 1954 Code

The proposed revenue ruling (Control File M-311) was scheduled for publication in advance of the regulations, and was referred to this division for consideration in connection with the established procedure for clearance with the Treasury Department.

In the past the Service has followed the decisions of the courts in the cases of *Brown v. Routzahn*, 63 F (2d) 914, and *Hardenbergh v. Commissioner*, 198 F (2d) 63, in determining whether the renunciation of a gift, bequest, or inheritance constitutes the making of a gift. Pursuant to *Brown v. Routzahn*, the Service has taken the position that if the decedent's death did not automatically vest title in the beneficiary, a timely renunciation of the bequest would not constitute the making of a gift. However, pursuant to the *Hardenbergh* case, the Service took the position that if title vested immediately, then the beneficiary by renouncing the bequest gave up something legally owned by him and thereby made a gift. The

distinction between the cases is whether title *vested* in the beneficiary. The proposed revenue ruling would, among other things, abolish the distinction and hold that a renunciation under the circumstances present in the *Brown v. Routzahn* case (where the renunciation became effective before legal title vested in the beneficiary) constitutes the making of a gift.

At the time that gift tax regulations under the 1954 Code were being developed, consideration was given to the inclusion in the regulations of the rules in *Brown v. Rouzahn* and *Hardenbergh v. Commissioner*. The proposed published ruling was reviewed by this Division and by the Legal Advisory Staff in connection with the consideration given to this matter. All persons concerned believed that the distinction drawn by these court decisions was artificial, and that renunciations under both sets of circumstances should be treated in the same manner. However, several persons felt that a reversal at this time of the Service's prior position might result in legislation excluding from gift tax renunciations under both sets of circumstances, and, therefore, that the prior position of the Service with respect to cases coming within the *Brown v. Routzahn* decision should not be changed. Mr. Laurens Williams, at that time Assistant to the Secretary (and Head, Legal Advisory Staff) inclined to this view. As a result language has been inserted in the proposed gift tax regulations adopting the rules in these two court decisions. The language in the proposed regulations (section 25.2511-1(c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the

> property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does [not] immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

Inasmuch as portions thereof are not in accord with the language of the proposed gift tax regulations, the proposed revenue ruling is returned for such disposition as you deem advisable.

Director
Technical Planning
Division

Attachment:
Bulletin Branch File

APPENDIX 9

T:P:A
CM-952

Director, Special Technical Services Division
Attention: Chief, Bulletin Branch

Director, Technical Planning Division

Proposed Revenue Ruling Relating to Section 2501 of the 1954 Code

The proposed revenue ruling (Control File M-311) was scheduled for publication in advance of the regulations, and was referred to this division for consideration in connection with the established procedure for clearance with the Treasury Department.

The language in the proposed regulations (section 25.2511-1 (c)) on the subject reads as follows:

> " * * * The renunciation of a vested property interest, such as the interest of an heir or next-of-kin, or devisee in whom title immediately vests upon a decedent's death under local law, constitutes a gift to those persons who receive the property interest by means of the renunciation. On the other hand the renunciation of a gift, bequest, or inheritance, if under local law title does not immediately vest, is not a gift if the renunciation is complete, and is made within a reasonable time after knowledge of the existence of the interest. * * * "

Inasmuch as portions of the revenue ruling are not in accord with the language of the proposed gift tax

regulations, it is returned with the recommendation that publication be withheld pending promulgation of its final gift tax regulations.

(signed John D.S. Littleton)
EHH
Director Technical Planning Division

Attachment:
Bulletin Branch File
WSGreen:arw-10-11-57

Initiator	Reviewer	Reviewer
P:A	TPA	T:P
Green	Hamblin	Littleton EHH
12/16/57	12/16/57	10/18/57

APPENDIX 10

BELL, BOYD, MARSHALL & LLOYD
135 SOUTH LASALLE STREET

CHICAGO
3

Air Mail

December 7, 1956

Mr. Paul Schmid
Office of the Chief Counsel
Room 5229
Internal Revenue Building
Washington 25 D.C.

Dear Paul:

I have finished going over the Gift Tax Regulations. Since some of my suggestions are really in the nature of questions, I thought it would expedite things if I sent you a memorandum of them, so that we can resolve them between us before I return a marked copy of the regulations to the Treasury. I am therefore enclosing several copies of such a memorandum. I suggest that if possible you telephone me after you have considered them.

I am also enclosing a draft of a proposed expediting memorandum.

I am sorry I have been a little longer about this than I had hoped to be.

Sincerely yours,

James P. Johnson

JPJ jes
Air Mail
Enclosures

copy to: Mr. Raphael Sherfy

Mr. Schmid's changes in the gift tax.

On page 22, paragraph (b) should the ninth line of this paragraph read "actuarial methods or actuarial method or other accepted valuation method."

On page 26, paragraph (1) the material in the parenthesis should indicate that the discretion lies with a trustee and the proviso portion of that paragraph should not be deleted.

On page 32, paragraph (c) the renunciation rule should not depend on testacy v. intestacy.

One page 33, paragraph (c) questions the partial disclaimer sentence.

On page 37, paragraph (1) in the first line after the word "property" insert the words "for less than an adequate and full consideration in money or money's worth."

One page 41, delete sentence inserted in margin.

On page 42, paragraph (b) in the third line from the bottom of the page strike the phrase "the gift is incompiete" and insert in its place "there is no transfer".

On page 43, paragraph (c) in line 5 after the word "beneficiarys" insert the word "other than himself", in line 6 place a period after the word "themselves" and strike the remainder of the existing sentence. Insert a new sentence reading "However, if the power is a fiduciary power limited by a fixed or ascertainable standard to name new beneficiarys, other than the donor, or to change the interests of the beneficiary as between themselves, the gift is completed.

On page 43, paragraph (d) valuation problem.

On page 44, paragraph (e) last sentence in the paragraph should not be deleted.

On page 44, paragraph (f) in the first sentence after the word "trust" insert the words "as trustee". In the second line eliminate the word "the" before the word "power" and substitute the word "a" after the word "power" strike the words "as trustee" and substitute therefor "without a fixed or ascertainable standard".

On page 45, paragraph (f) strike the period after the last word in the paragraph and add the phrase "and are not completed gifts".

On page 52, in the insert, insert the words "such as" before the word "is" in the fourth line from the bottom.

On page 54, second line strike "good will" and substitute "value".

On page 71, the sentence beginning "See, however, section 2515 . . . ." which was deleted from the regulations should be reinserted at the end of § 25.2512.

On page 76, paragraph (d)(2) after the word "gifts" the word "correctly" should be inserted. Paragraph (d)(4) after the word "gifts" the word "correctly" should be inserted.

In (d)(2) and (d)(4) of the same page the word "proper" should be stricken and substitute the word "spouse's".

On page 87, the last sentence in paragraph (2) should be put back in the regulations.

APPENDIX 11

U. S. TREASURY DEPARTMENT

Washington 25

Oct. 1, 1958

T:P:WE
R-346-1

MEMORANDUM FOR: Honorable Robert B. Anderson Secretary of the Treasury

SUBJECT: Proposed Treasury decision – Regulations under provisions of the Internal Revenue Code of 1954 relating to the gift tax.

There is transmitted herewith, with the recommendation that it be approved, a proposed Treasury decision which would issue the Gift Tax Regulations (26 CFR Part 25) under chapter 12 of subtitle B of the Internal Revenue Code of 1954. The regulations contained in the proposed Treasury decision are applicable to gifts made on or after January 1, 1955.

The proposed Treasury decision is substantially the same as that published as notice of proposed rule making in the Federal Register of January 3, 1957 (22 F.R. 53). In those areas where the Estate Tax Regulations and the Gift Tax Regulations interpret similar provisions of law, the Gift Tax Regulations have been conformed to agree with the positions taken in the Estate Tax Regulations. Among the provisions of law pertaining to the estate tax and the gift tax which are similar are those relating to valuation of

property, powers of appointment, charitable deductions, marital deductions, and certain administrative provisions relating to the time and place for filing returns and paying tax, the keeping of records, etc. In the case of the Estate Tax Regulations certain material found in the notice of proposed rule making was removed from the final regulations because of doubt as to the accuracy of the material, and certain subjects were not treated (or, if treated at all, were referred to in general terms only) because of lack of agreement as to the precise rule to be followed. Where such material and subjects also come within the scope of the Gift Tax Regulations, the same action was taken as in the case of the Estate Tax Regulations. Among these subjects are transfers for less than full consideration (including property settlements and transfers for support which do not come under section 2516), and the valuation of shares in open-end investment companies. A few significant changes were made in the portions of the proposed regulations which pertain to subjects peculiar to the gift tax. These changes may be summarized as follows:

Disclaimers.

Paragraph (c) of section 25.2511-1, as set forth in the notice, discusses certain acts which constitute the making of a gift. Among the acts discussed is the renunciation, or attempted renunciation, of property, or a property interest, passing from a decedent. In what was intended to be the application of the rules in *Brown v. Routzahn* (1933) 63 F.2d 914, cert. denied 290 U.S. 641, and *Hardenbergh v. Commissioner* (1952) 198 F.2d 63, cert. denied 344 U.S. 836, it was stated that where title to the property did not vest in the beneficiary or heir immediately upon the decedent's death, the renunciation of the property did not constitute the making of a gift, but that where title vested in the beneficiary or heir

immediately upon the decedent's death, the act of the beneficiary or heir in giving up what passed to him from the decedent constituted the making of a gift. Furthermore, in the notice the position was taken in paragraph (c) that a partial renunciation of property could not be made. Protests on these provisions were received. After reviewing these protests, we have reconsidered our position and now believe that the proper distinction between these two court cases turns on the question of whether under the applicable State law a beneficiary or heir can or cannot refuse to accept ownership of the property which passed from the decedent. Accordingly, we have revised paragraph (c) of section 25.2511-1 to reflect this change of position. Also, we have abandoned the position that a partial renunciation cannot be made, and paragraph (c) has been further changed to recognize a partial renunciation where it is effective, as such, under local law.

Annual exclusions for gifts to minors.

In general, section 2503 (b) authorizes an annual exclusion of $3,000 for gifts of present as against future interests. Section 2503 (c) then provides (in part) that a gift of property to a person under 21 years of age will not be considered a gift of a future interest in property if the property "may be expended . . . for the benefit of" the donee before his attaining the age of 21 years. In the notice of proposed rule making, it was indicated by way of example that the above-quoted condition of the section might be satisfied even though the trustee or custodian of the property did not have the unrestricted discretion to determine the amount and purpose of any expenditure for the donee. This example has been modified in order to point out that the trustee or custodian must have unrestricted discretion in these respects.

Section 2503 (c) further provides that in the event the donee dies before attaining the age of 21 years, the property must be payable to his estate or "as he may appoint under a general power of appointment." The position is taken in the notice that the power of appointment must be validly exercisable by the donee under the applicable local law (taking into account the fact that the donee is under 21 years of age). It is our opinion that Congress did not intend that the condition of the section relating to the power of appointment be satisfied by setting up a power of appointment in the donee that could never be used. Certainly, a literal reading of the statute supports such position, i.e., if the power was not exercisable, the property would not "be payable . . . . as [the donee] may appoint." Furthermore, it is our understanding that the purpose of section 2503 is to allow the annual exclusion for gifts to minors when they substantially own the transferred property (because gifts to adults receive such treatment). The minors do not substantially own the transferred property if, when they die under 21 years of age, the donor can control the disposition of the property (as he can if the minor is given a nonexercisable power, with gift over in default of appointment).

Only a few protests were received which objected to the position taken in the notice regarding the power of appointment. Such protests contain two main arguments. First, it is contended that the position taken in the notice is inconsistent with Rev. Rul. 55-518, C.B. 1955-2, 384, which would include in a decedent's gross estate under section 2041, the value of property over which the decedent "has at the time of his death a general power of appointment" even though such power is not exercisable because of the decedent's incompetency. It is our thought that the position in the notice is proper and that it can be reconciled with the ruling, since the

language contained in section 2503 (c) is different from that contained in section 2041 (see above-quoted material). However, if it should be determined that the position taken in the notice is inconsistent with Rev. Rul. 55-518, reconsideration could be given at a later time to the position in the revenue ruling, taking into account other related problems in the field of estate taxation.

Secondly, it is contended that Congress knew that persons under the age of 21 cannot generally exercise powers of appointment and that the inclusion of the power of appointment provision was intended to cover cases where minors were given nonexercisable powers. This argument does not seem convincing to us, especially since in some States powers of appointment can be exercised by persons under 21 years of age (e.g., some States allow a person 18 years of age to exercise powers of appointment).

Commissioner

Attachment

WSGreen:jk:10-1-58

[At least one dozen sets of initials and dates are at the bottom of this page.]

APPENDIX 12

Internal Revenue Service Private Letter Ruling
6612201590A
(Dec. 20,1966)

Citation
6612201590A

2511.00-00
Transfers in General (Gift V. Not a Gift)

December 20, 1966

* * *
* * *

This refers to your letter of September 16, 1966, and prior correspondence, wherein you request a ruling with respect to the Federal gift tax and income tax consequences of a proposed renunciation by the above-named taxpayer of an income interest in a trust, described below, with respect to which she is presently a joint income beneficiary.

You ask whether the proposed disclaimer would be deemed a taxable gift under the provisions of section 2511 of the Internal Revenue Code of 1954. You also ask whether the income accruing to the disclaimed interest should be taxable to her under sections 652 and 662 of the Code.

* * * created an inter vivos spendthrift trust on December 7, 1933. The trust instrument provided for net income of the trust to be paid to the taxpayer's mother, * * * during her life.

Paragraph SECOND(b) of the trust provides, in part, the following:

'Upon the death of said * * * the trustees shall pay in convenient periodic installments not less frequently than quarterly the net income of the trust estate, share and share alike, to the children of said * * * who survive her and to the issue per stirpes of any child who may have predeceased her or not having predeceased her may die before the termination of the trust herein created.'

Under paragraph SECOND(d), the trustor directs that the trust terminate 21 years after the death of the last survivor of the children now living of said * * * and the Trustees shall thereupon divide the principal of the trust estate remaining after all proper charges as herein provided for and pay the same share and share alike among the grandchildren and the issue per stirpes of any deceased grandchild of said * * *.

The trustor died on September 27, 1935. * * * died on January 4, 1936, survived by four children, * * *. Each of * * * children received a one-quarter shares of the trust income following her death.

* * * died on April 17, 1963, and * * * died on March 16, 1964, each survived by adopted sons. The Supreme Court of Pennsylvania held in an opinion entered on * * * (appeal of * * *), that the adopted sons were not entitled to succeed to the respective interest of their adopted fathers. Petition for reargument was denied on June 23, 1966. As a result of this decision, one-half of the income interests of the adopted sons became payable to * * * the taxpayer, and one-half to * * *. Upon hearing of the Supreme Court decision, the taxpayer, through her attorneys, advised the trustee that she wished irrevocably and unqualifiedly to refuse to accept * * * income interest provided she could do so under Pennsylvania law. Counsel for the trustee subsequently advised her that she could. You also indicate that the taxpayer never accepted dominion and control over any portion of * * * interest.

The trustees have retained all sums accruing with respect to that interest in a reserve account.

Section 2511(a) of the 1954 Code provides, in part, that the gift tax pertains to gifts indirectly made. On the other hand, section 25.2511—l(c) of the Gift Tax Regulations provides that 'Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent * * *, a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable and effective under the local law. There can be no refusal of ownership of property after its acceptance. * * * In any case where a refusal is purported to relate only to a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law.'

An income beneficiary of a spendthrift trust may renounce a portion of that income interest under the law of Pennsylvania. See Gallagher v. Smith, 223 F.2d 218 (1955).

The trustor expressed his intent to have the income interest of his grandchildren devolve to their issue, we construe the intent of the trustor to provide that any renounced income interest by the grandchildren shall pass to their natural children.

In view of the foregoing, it is held that taxpayer's proposed renunciation will not result in a taxable transfer of the interest for gift tax purposes to her natural children if such renunciation is executed within a reasonable time from the time that she first received notice of her right to the additional income interest. If the proposed renunciation is executed at the present time, the execution

would be effected within a reasonable time within the meaning of section 25.2511-1(c) of the regulations. Cf. Kathryn S. Fuller v. Commissioner, 37 T.C. 147 (1961). As indicated above, the taxpayer has not accepted the subject interest at the present time.

Section 652(a) of the Internal Revenue Code provides, in part, that the amount of income for the taxable year required to be distributed currently by a trust shall be included in the gross income of the beneficiary to whom the income is required to be distributed, whether distributed or not.

Section 301.3 of Title 20 of Purdon's Pennsylvania Statutes Annotated permits an income beneficiary of a Pennsylvania spendthrift trust to release or disclaim his right to income from the trust, provided that such released or disclaimed income passes to one or more of the beneficiary's descendants. The trust income proposed to be disclaimed by the taxpayer in the instant case would pass to her children.

Since the proposed disclaimer of trust income by the taxpayer would be effective and irrevocable under local law, the taxpayer would not be required to include in her gross income, under section 652(a) of the Code, the income subsequently accruing to the trust. However, income accrued to the trust which would be distributable to the taxpayer before she makes her disclaimer will be includible in her gross income, notwithstanding, the fact that it is actually paid to her children. Revenue Ruling 61-62, C.B. 1964-1 (Part 1) 221.

Very truly yours,

(Signed) Lester H. Wallace
Acting Chief, Estate and Gift Tax Branch

6612201590A
END OF DOCUMENT

APPENDIX 13

"QUESTION: Mr. Smith, when was it first made as clear as can be that the regulation means or meant what you now say it means? From the very time it was issued [1958]? Do you think that's the only possible reading of the regulation is the reading you give it?

MR. SMITH: [Stuart A. Smith, Esq. of the Solicitor General's Office]: Well, one can read property to mean the actual property that one puts in one's pocket, but the gift and estate tax is replete with the fact that for 40 years it has subjected itself-the tax has been subject to a future interest as well.

QUESTION: Well, do you think you've answered my question or not?

MR. SMITH: Well, one can always read things differently, but it seems-

QUESTION: But the first part of my question was when did it become perfectly clear that the Commissioner administered the regulation the way he is now administering it?

MR. SMITH: I can't answer that question because of the paucity of cases. I suppose that it became perfectly, absolutely clear with authority when the Tax Court decided the Keinath case [1972] because that was the first case that really dealt with the disclaimers. But it seems to me that the words-

QUESTION: That case got to the Tax Court. It certainly had the seeds long before that.

MR. SMITH: Well, perhaps the paucity of litigation suggests that people were disclaiming within a reasonable time and, you know, there just weren't any cases. I would simply say that the words-

QUESTION: At least the Commissioner didn't change his mind.

MR. SMITH: Absolutely not." (emphasis added)

FILED
SEP 2 1993
OFFICE OF THE CLERK

No. 92-1546

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

UNITED STATES OF AMERICA,
Petitioner,
v.
JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY IN SUPPORT OF RESPONDENTS

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36 pp

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1546

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN O. IRVINE AND FIRST TRUST NATIONAL ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF *AMICUS CURIAE* OF JOHN G. ORDWAY, JR. AND MARGARET M. ORDWAY IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

John G. Ordway, Jr. is the brother of the late Sally Ordway Irvine, for whom Respondents are the personal representatives. Mr. Ordway also was the beneficiary of a trust established in 1917 by their grandfather, Lucius P. Ordway. Like Mrs. Irvine, upon the death of the trust's last surviving income beneficiary in 1979, Mr. Ordway validly disclaimed a portion of his interest in the trust corpus in accordance with state law. On their gift tax returns for the appropriate periods, Mrs. Irvine

and Mr. Ordway each took the position that their disclaimers were not subject to federal gift tax because 1) the disclaimers were valid under state law, and 2) federal regulations imposing a gift tax on otherwise valid disclaimers could not be applied where the interest disclaimed had been created by a transfer in trust made prior to enactment of the Gift Tax Act in 1932 (Revenue Act of 1932, ch. 209, 47 Stat. 169 (1932)). Petitioner United States of America, acting through the Internal Revenue Service, disagreed, and litigation ensued.[1]

After the Ordways prevailed in the district court, a divided panel of the United States Court of Appeals for the Eleventh Circuit reversed, holding that the disclaimer was subject to federal gift tax. *See Ordway v. United States*, 908 F.2d 890 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 2916 (1991). The facts in the *Ordway* and *Irvine* cases are "virtually identical" (Pet. App. 17a).

The *Ordway* case, on remand from the Eleventh Circuit, remains pending in the United States District Court for the Southern District of Florida for the resolution of certain disputed valuation issues. *See Ordway v. United States*, No. 87-8187 (S.D. Fla.). As such, it would be governed by a decision of this Court in the *Irvine* case. *See Harper v. Virginia Dep't of Taxation*, 61 U.S.L.W. 4664 (U.S. June 18, 1993). Mr. and Mrs. Ordway thus have a direct and substantial interest in this Court's disposition of the case on the merits.

Consent to the filing of this brief has been given by petitioner and respondents, and is filed herewith.

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[1] Margaret M. Ordway, Mr. Ordway's wife, consented to being deemed to have made one-half of the alleged gifts attendant to her husband's 1979 disclaimer and thus was a party in the litigation to recover the tax assessed and paid. *See* 26 U.S.C. § 2513.

SUMMARY OF ARGUMENT

I.

For federal gift tax purposes, the disclaimer of an interest created in a 1917 transfer into trust cannot be subjected retroactively to rules implementing the 1932 Gift Tax Act. Section 501(b) of that Act expressly prohibits the retroactive taxation of gifts. The imposition of tax based upon new rules added after the irrevocable transfer which created the interest, and the disclaimer right associated therewith, violates this statutory nonretroactivity. The rule to be applied is simple, consistent, and equitable: disclaimers are subject to taxation only under the rules that exist at the time of the transfer creating the interest and its attendant right to disclaim. This principle follows the reasoning of the Court in *Jewett v. Commissioner,* 455 U.S. 305 (1982), which found no violation of Section 501(b) of the Gift Tax Act for the stated reason that the disclaimer subject to tax involved an interest whose creation postdated the statute. In all other respects *Jewett,* which construed a Treasury Regulation that is inapplicable to pre-Act interests and that governs only the timeliness of disclaimers, does not bear on the question of retroactivity presented in this case.

Congress made the 1932 Gift Tax Act nonretroactive to protect the settled expectations of donors who, in reliance upon the law then in existence, made irrevocable gifts and parted with their property prior to the Gift Tax Act. The statutory provision was intended to spare such donors from the unintended and unanticipated effects of an entirely new tax which, if applied, could compromise the purposes of their gift and estate planning and lead to the disparate treatment of similarly situated beneficiaries. Donors are thus entitled by statute to know the rules applicable to their irrevocable actions before those actions are taken. In the disclaimer context, these policies require that the statutory protection against retroactive taxation attach when a donor's irrevocable transfer creates

the interest later disclaimed. A disclaimer is the formal refusal to accept a gift, which, if made in accordance with applicable state law, allows property to pass from the original settlor as if the person disclaiming did not survive to accept and receive the gift. Instead, the property passes to an alternate recipient selected by the settlor, in accordance with the settlor's irrevocable instructions. These are the interests within Congress's concern in 1932, and every one of them would be sacrificed if, as the Government urges, changes in rules governing gift taxation are made applicable only with regard to the date of the disclaimer.

This proper rule of construction is supported by abundant and uniform precedent, and the plain language of the Government's own regulations. In the years following 1932, Congress has acted to change the gift tax laws specifically applicable to disclaimers and related powers four times, most recently in 1981. In every case it has maintained the principle of nonretroactivity, applying changes only to disclaimers of interests and related powers created after passage of the new legislation. This unbroken line of congressional precedent builds on the original nonretroactivity of the gift tax. Together they establish the principle that retroactivity can only be determined with reference to the date on which a disclaimed interest is created. In other words, the rules governing the taxability of a disclaimer are those that exist at the time the interest disclaimed is created.

The Government cites no precedent to the contrary. *Jewett v. Commissioner* held that a contingent remainder interest was a property right which, if deemed under a federal timeliness standard to have been accepted, could be taxed upon subsequent disclaimer. That case did not hold that a disclaimer was the relevant "transfer" for purposes of determining retroactivity; it could not so hold, as it involved a 1939—post-Act—transfer into trust. Other examples offered by the Government in which property interests created prior to 1932 could be taxable

upon transfer similarly are inapposite. None, for example, involves the exercise of a disclaimer or a related power. Rather, they involved gifts already reduced to ownership and possession, in which case the donor no longer retained an interest, or transactions that were subject to alteration after passage of the taxing statute.

II.

The statute's limitation to disclaimers of interests created after June 6, 1932 is also evident in implementing regulations (Treas. Reg. § 25.2511-1(c)) which consider potentially taxable only disclaimers of interests created in "taxable transfers." That phrase, which has appeared in the relevant Treasury Regulation since 1958, is defined by statute to include only transfers occurring after passage of the Gift Tax Act. It therefore does not embrace the Ordway Trust and the Irvine disclaimer is not taxable.

The Government is wrong as a matter of history and law that § 25.2511-1(c)(2) is merely a "safe harbor" whose inapplicability—for any reason—results in a finding of taxation. The general understanding shared by taxpayers and the Service alike after 1932 was that disclaimers valid under state law were not "transfers," and therefore not within the scope of the gift tax. There is no question that the regulation was intended to add an *additional* trigger for taxation, deeming an interest to have been accepted even if still subject to disclaimer under state law. This Court's conclusion in *Jewett* that a federal timeliness standard was consistent with the statute is not to the contrary.

Section 25.2511-1(c)(2) similarly can provide no basis for any claim that Mrs. Irvine's—but not John Ordway's—constitutional rights would be violated by the imposition of taxation. The constitutional claim depends in the first instance upon a construction of the regulation's retroactivity that is inconsistent with the regulation's plain language and effective date.

ARGUMENT

I. TAXATION OF THE IRVINE DISCLAIMER IS PRECLUDED BY THE STATUTORY NONRETROACTIVITY OF THE 1932 GIFT TAX ACT

A. This Case Involves Only The Applicability Of The Gift Tax Act's Retroactivity Provision, Not The Scope Of The Tax

Unlike *Jewett v. Commissioner*, 455 U.S. 305 (1982), this case presents no issue as to the scope of the gift tax under 26 U.S.C. §§ 2501(a) and 2511(a). Rather, the question presented in this case is whether rules promulgated pursuant to the 1932 Gift Tax Act for the taxation of disclaimers apply to a disclaimer of an interest created fifteen years prior to enactment of the tax through a 1917 transfer into trust. Construction of the 1932 Act must begin, of course, with a review of the statutory language. *See, e.g., Commissioner v. Soliman*, 113 S. Ct. 701, 704 (1993). The only statutory language relevant here is that which makes imposition of the gift tax purely prospective: "The tax shall not apply to a transfer made on or before the date of enactment of this Act [June 6, 1932]." Revenue Act of 1932, ch. 209, § 501(b), 47 Stat. 169, 245. This language embraces the exercise of a disclaimer power over an interest created in a pre-Act transfer, and as a consequence no additional federal standard can be applied to determine the taxability of the Irvine disclaimer. Because the disclaimer at issue here satisfied all state law requirements in existence when the interest was created, it is not subject to tax and the decision of the court of appeals must be affirmed.

This Court in *Jewett*, consistent with the view that Congress intended the gift tax to reach a wide range of direct and indirect transfers, found that the disclaimer of an interest created in 1939 could be taxed. *See* 455 U.S. at 309-10. The Government presents *Jewett* as con-

trolling, and argues that the broad policy of the gift tax to complement the estate tax scheme requires that the Irvine disclaimer be taxable. Pet. Br. 14-16, 18. Both *Jewett* and the policy-driven expansiveness of the gift tax are not relevant here, however, and appeals to them are misguided. The question is not what sorts of property interests may be subject to the Act upon transfer, but *which* transfers otherwise within the scope of the tax were specifically exempted from federal rules of taxation by Congress through the nonretroactivity provision of § 501(b) of the Act. To answer that question, it is necessary to review an entirely different set of precedents and policy considerations, none of which are discussed in the Government's brief.

B. The Retroactivity Of The Irvine Disclaimer For Gift Tax Purposes Must Be Judged With Reference To The Creation Of The Ordway Trust In 1917, To Which The Disclaimer Relates Back

The Government contends categorically that the 1979 Irvine disclaimer is the only event relevant to determining whether or not taxation of that disclaimer is impermissibly retroactive. Pet. Br. 17-20. This is wrong; for purposes of *retroactivity* the only date having significance is 1917, when the Ordway Trust was created, when Lucius Ordway irrevocably gave his grandchildren an interest then subject to valid disclaimer under state law without penalty, and when Mr. Ordway specified who would take in the event a grandchild exercised his or her state-law disclaimer rights or died. The 1932 Act provided for nonretroactive application to protect settled expectations such as these, formed years earlier through irrevocable gifts into trust. To understand why the nonretroactivity provision may only be construed in this manner it is necessary to review the operation of the disclaimer power, examine the purposes of the provision as expressed by Congress, and explore an unbroken line of legislative enactments carrying forward the 1932 concept of retro-

activity specifically in the context of disclaimers and related powers.

It is appropriate to begin with an explanation of the disclaimer power. A disclaimer is the formal refusal to accept a gift; it is a creature of state law, and acts under state law to cause an *inter vivos* or testamentary transfer to pass as if the disclaimant did not survive to accept and receive the gift. *See, e.g.*, Minn. Stat. Ann. §§ 525.-211, 525.532 (West 1988). A disclaimer thus is unlike an ordinary passing of property, in which a donor voluntarily parts with property which he or she owns and possesses. Rather, it is the exercise of the formal power to refuse or reject a gift *ab initio*, the consequence of which is the passage of the interest from the original settlor to an alternate recipient selected *by the settlor*, in accordance with the *settlor's* irrevocable instructions. A disclaimer thus relates back to the date of the original transfer that created the interest disclaimed. *Stoehr v. Miller*, 296 F. 414, 425 (2d Cir. 1923) (1922 disclaimer related back to 1917 transfer into trust to defeat seizure of trust assets under subsequently enacted Trading With the Enemy Act); *cf. United States v. Merchants Nat'l Bank of Mobile, Ex'r.*, 261 F.2d 570, 575 (5th Cir. 1958). Its effect "is to put [the person disclaiming] in the same position as though the beneficial interest had never vested in him, his disclaimer operating retroactively." Austin W. Scott and William F. Fratcher, *The Law of Trusts*, § 36.1 at 391-92 (4th ed. 1987). For gift tax purposes this is critical, because a distribution to a beneficiary from trust is not deemed to be a gift when *distributed*, but rather when the original property was irrevocably placed into trust—here, in 1917. 26 U.S.C. §§ 2511 and 2501(a)(1).[2]

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[2] With the generation-skipping transfer tax, Congress has chosen to tax certain beneficiaries upon changes in or distributions of their interests in trusts. *See* 26 U.S.C. §§ 2611(a) and 2612. In keeping with the general rule, this tax was applied prospectively,

A disclaimer thus relates back to the date when the underlying interest was created, not when the disclaimer power is subsequently exercised. And indeed, in passing legislation affecting the taxability of disclaimers, Congress has implemented precisely this understanding. On every such occasion Congress has changed the gift tax laws prospectively only, and has defined prospectivity in terms of the date of the transfer creating the interest disclaimed, not the date of the subsequent disclaimer of that interest. In 1976, for example, Congress added Section 2518 to the Internal Revenue Code ("Code"), which was intended to make more uniform the federal taxation of disclaimers. Section 2518 subjects to gift tax any disclaimer, *inter alia*, made more than nine months from the "transfer creating the interest," even if the disclaimer still is valid under state law. Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b), 90 Stat. 1893. Section 2518 was made effective prospectively, "with respect to transfers creating an interest in the person disclaiming made after December 31, 1976." Prospective application of the change in the law, in other words, turned not on the *date of the disclaimer* but on the *date of creation of the interest disclaimed*.[3] Congress amended Section 2518 in 1981, to minimize further the variation in the taxability of disclaimers that resulted from differences in state law. And again, the changes were applicable only to the disclaimers of interests created in *transfers* occurring after the legislation.[4] *See* Eco-

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to applicable changes in and distributions of interests only for *trusts created after* the effective date of the legislation. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1433(b)(1) and (2), 100 Stat. 2731.

[3] In *Jewett*, this Court characterized the 1976 amendment's formulation as reflecting "the legislative decision not to apply [the new] standards retroactively." 455 U.S. at 317.

[4] Treasury regulations interpreting these statutory provisions incorporated the same definition of retroactivity. *See* Treas. Reg. § 25.2518-1(c).

nomic Recovery Act of 1981, Pub. L. No. 97-34, § 426(b), 95 Stat. 318. Thus, for purposes of gift taxation, Congress through successive prospective enactments in 1932, 1976, and 1981 has divided all disclaimers into four groups, based upon the date of creation of the interest disclaimed: interests created prior to June 7, 1932, interests created between June 7, 1932 and December 31, 1976, interests created between January 1, 1977 and December 31, 1981, and interests created on or after January 1, 1982. The continuity and predictability of disclaimer taxation so viewed—from the standpoint of the donor, the recipient, and the Treasury—would be lost under the rule urged by the Government. *Cf. Commissioner v. Lester*, 366 U.S. 299, 304 (1961) ("[a]s we have frequently stated, the Code must be given as great an internal symmetry and consistency as its words permit") (internal quotations omitted).

The same policies underlying the nonretroactivity of congressional legislation dealing with disclaimers is also evident in 1942 legislation making taxable the exercise and the release of general powers of appointment.[5] The release of a general power is like a disclaimer because in each instance the holder, by the act of releasing or disclaiming, foregoes the right to receive property designated for him or her, allowing the property to pass pursuant to the instructions provided by the original settlor. Indeed, the Court in *Jewett v. Commissioner* analogized the two. *See* 455 U.S. at 317-18. The tax established by the 1942 legislation was imposed prospectively, not with respect to when a power was exercised or released, but when it was *created*. *See* Revenue Act of 1942, Pub. L. 77-753, § 403(d), 56 Stat. 798. For interests created before passage of the legislation, holders were free for a period to release their powers without penalty. Congress

[5] A general power of appointment permits the holder, upon exercise, to designate the recipient of an interest—including the designation of himself or herself. 26 U.S.C. § 2514(c).

amended the provision in 1951, to eliminate entirely any taxation of pre-42 powers so long as they were released in accordance with state law. This was done with the express recognition that many powers had been created prior to 1942 in reliance on the prior law, and that forcing holders to release within the grace period or be taxed (or simply to be taxed upon tardy release through lack of knowledge of the new law), "would seriously impair the arrangements made by the creator of the power for the benefit and protection of his family." S. Rep. No. 382, 82d Cong., 1st Sess. (1951), *reprinted in* 1951 U.S.C.C.A.N. 1530, 1531. Again, in the 1951 legislation Congress respected the principle of nonretroactivity, and achieved its goals of repose by defining retroactivity with reference to when an interest was created, not when it was released. *See* 26 U.S.C. § 2514(a) and (b).

Protecting the legitimate expectations of donors who had irrevocably parted with their property indeed is the fundamental policy behind the nonretroactivity provision of the 1932 Gift Tax Act, and the subsequent legislative actions built consistently on the policies first there protected. Passage of the 1932 Act, of course, followed decisions of this Court that had struck down as unconstitutional prior gift tax statutes having a retroactive component. *See Untermyer v. Anderson*, 276 U.S. 440 (1928); *Nichols v. Coolidge*, 274 U.S. 531 (1927); *cf. Blodgett v. Holden*, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928). *See also* Pet. Br. 16 n.5. As the pertinent legislative materials make clear, the 1932 legislation was passed to comport with these decisions, and to codify what this Court, in 1932, deemed to be the constitutional limitations on the power to impose an excise tax: "The gift tax may not constitutionally apply to gifts made prior to the date of the enactment of the act imposing the tax." S. Rep. No. 665, 72d Cong., 1st Sess., at 43 (1932); *accord*, H.R. Rep. No. 708, 72d Cong., 1st Sess., at 31 (1932). *See also* Pet. Br. 16 n.5.

In both the judicial and the complementary legislative actions, retroactivity was proscribed to secure what was considered to be fundamental fairness to settlors. As a contemporary commentator observed: "[I]f these decisions can be harmonized by a single doctrine it would probably be as follows: Retroactive application of a tax law is permitted only where it would not operate unfairly by attaching consequences to an act by a taxpayer which he could not reasonably have been foreseen." Ralph R. Neuhoff, *Retrospective Tax Laws*, 21 St. Louis L. Rev. 1, 2 (1935). *See also Welch v. Henry*, 305 U.S. 134, 147 (1938). Thus, in determining how to apply to disclaimers the 1932 Gift Tax Act's requirement of nonretroactivity, the touchstone is protection of the settlor's reasonable expectations.[6] *Cf. Cottage Savings Ass'n v. Commissioner*, 111 S. Ct. 1503, 1508-09 (1991) (reviewing cases from the 1920s to determine the meaning of a statute that codified their holdings). And to accomplish this goal, nonretroactivity requires that the gift tax consequences of a disclaimer be judged with reference to the rules in effect when the irrevocable transfer into trust was made.

Lucius Ordway's decision in 1917 to establish a trust and structure it as he did was shaped by the law as it then existed. He could not know that fifteen years

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[6] Enforcement of the nonretroactivity provision to protect a donor's reasonable expectations involves consideration of congressional intent, not the enforcement of the donor's constitutional rights. Such latter inquiry, of course, would be appropriate to the extent such rights bear upon the beneficiaries' rights. *See Hodel v. Irving*, 481 U.S. 704, 711-12 (1987). And in this regard it bears noting that, while *Untermyer* has not been extended beyond the 1932 Gift Tax Act—which is at issue here—its validity in that context has not been undermined. *See United States v. Hemme* 476 U.S. 558, 567-68 (1986); *United States v. Darusmont*, 449 U.S. 292, 299 (1981); *Ferman v. United States*, 993 F.2d 485, 490 n.7 (5th Cir. 1993).

later Congress would create "a wholly new tax," *United States v. Hemme*, 476 U.S. 558, 568 (1986), and in the view of the Government expose his designated beneficiaries to a financial penalty for taking actions (*e.g.*, refusing to accept a gift through the exercise of a disclaimer power in accordance with state law) or refraining from taking actions which then had no consequences. Had he known, the disclaimer power he gave to his grandchildren could have been replaced, for example, with a general power of appointment, which could have been released without tax consequences.[7] *See* pp. 10-11, *supra*. This potential unfairness arises only with the rule advanced by the Government, which would tax the 1979 disclaimer of a 1917 interest by 1979 standards, yet tax the release of a general power of appointment created at the same time, properly, under the law that existed in 1917. The anomaly of this result is patent: The disclaimer of an interest is taxable, yet the release of the much greater right to cause a transfer to be made to anyone, is not.[8]

It is important to observe that honoring the Gift Tax Act's nonretroactivity provision does not mean that a subsequent disclaimer is wholly *exempt* from a gift tax. Rather, it means that the right created upon the 1917 transfer may not be subjected to *additional* tax rules

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[7] No argument is being made here that what Lucius Ordway did should be nontaxable because it has the same "economic reality" as creation of a nontaxable general power of appointment. *Cf. Commissioner v. National Alfalfa Dehydrating Milling Co.*, 417 U.S. 134, 148 (1974). Rather, the point merely is that Lucius Ordway's irrevocable plans and legally protected interests were compromised because a wholly new tax was imposed on his actions after-the-fact. *Cf. Welch v. Henry*, 305 U.S. at 147.

[8] Indeed, the holder of a general power of appointment may even be the life income beneficiary of the interest over which he or she holds a power without subjecting a subsequent release to taxation. *See* 26 U.S.C § 2514(a); 26 C.F.R. § 25.2514-2(c).

imposed after-the-fact. Lucius Ordway provided for his beneficiaries to have interests subject to disclaimer, so long as they acted in accordance with the state law. That limitation never disappeared. An attempted disclaimer that did not satisfy state law would not act as a refusal to accept, calling into play the substitute beneficiary selected by the settlor. Rather, it would be a retransfer following acceptance by the beneficiary, and in that transaction the settlor's continuing interest would have expired and he would have no legally protectable expectation. It could, therefore, be subjected to a gift tax consistent with both the statutory and constitutional prohibitions against retroactivity. This indeed is the factual context in which the ineffective attempt to disclaim an interest passing as a matter of law by intestate succession was found taxable in *Hardenbergh v. Commissioner,* 198 F.2d 63 (8th Cir.), *cert. denied,* 344 U.S. 836 (1952).[9]

Against these historically protected interests and direct legislative precedents, the Government cites cases and makes arguments that have nothing to do with the retroactivity of disclaimers. *Jewett v. Commissioner,* which the Government claims to be controlling, to the extent relevant at all can only be read as supporting the nontaxability of the Irvine disclaimer. *Jewett* involved the 1972 disclaimer of an interest created in a 1939 transfer. No issues of statutory retroactivity thus were presented, as the Court observed:

> Petitioner also argues that it is unfair to apply the 1958 Regulation "retroactively" to an interest that had been created previously . . . . The argument . . . is based on an assumption that petitioner had a "right" to renounce the interest without tax consequences that was "taken away" by the 1958 Regu-

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[9] No issues of line-drawing need be addressed as to which expectations of the settlor must be honored. The point is that the nonretroactivity provision simply must be read as applying based upon the date of the transfer creating the interest disclaimed. The appropriate rules of taxation will follow as a consequence.

> lation. Petitioner never had such a right. Indeed, petitioner does not argue that taxation of the disclaimers is inconsistent with the statutory provisions imposing a gift tax, which were enacted long before *petitioner's interest in the trust was created.*

455 U.S. at 317 (emphasis added). In concluding that no issue of statutory retroactivity was presented, the Court looked solely to the date when the *Jewett* interest was created, as we do here.[10]

Jewett similarly cannot stand for the "holding" attributed to it by the Government that the "transfer" for purposes of the 1932 Act's retroactivity provision is the disclaimer alone. Pet. Br. 16. Citing the expansive definition of property within the scope of the gift tax set forth in *Smith v. Shaughnessy*, 318 U.S. 176, 180 (1943), *Jewett* indeed held that a contingent future interest is a type of interest, the gift of which, consistent with the statute, could be subject to a federal standard of deemed acceptance; the Court did not hold that *every* disclaimer is taxable, a question not even remotely presented.[11] And except for the passages quoted above which tie retroactivity to the date of creation of an interest, the case has nothing to say as to how the definition of retroactivity is to be implemented. Indeed, the Court concluded that the term "transfer" is ambiguous, ultimately interpreting its

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[10] The Court then observed that no issues of *regulatory* retroactivity were presented, as the disclaimers were made some fourteen years after the regulation in question was adopted. *Ibid.*

[11] The Government correctly states *Jewett's* limited holding in this regard, reciting that: "[t]he Court squarely rejected" the contention that "*any* valid disclaimer would be exempt and the gift tax would never apply." Pet. Br. 31 (emphasis in original). The fact that the Government had a reasonable rationale of deemed acceptance for taxing certain disclaimers not timely made does not mean that it may tax them all. *Cf. Dickman v. Commissioner*, 465 U.S. 330, 341 (1984) (permissible taxation of interest-free intrafamilial loans does not mean that all acts of intrafamilial generosity are taxable).

use in Treas. Reg. § 25.2511-1(c) to refer to the original transfer into trust for purposes of that regulation's federal timeliness standard. *See* 455 U.S. at 311-12, 318.

None of the other cases cited by the Government even involves a disclaimer or a power remotely resembling one. Two of the cases cited by the Government, *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939), and *Burnet v. Guggenheim*, 288 U.S. 280 (1933), stand only for the proposition that transfers are not complete for gift tax purposes until irrevocable, with the termination of the donor's retained rights to modify the disposition of trust assets the appropriate event of taxation. *Accord*, Treas. Reg. § 25.2511-2(b). Here, of course, Lucius Ordway's transfer into trust was irrevocable when made in 1917, underscoring the appropriateness of considering that action the operative one for gift tax purposes. What Mrs. Irvine possessed and exercised by her disclaimer was only the power under state law to refuse to accept that gift, in which event the disposition of property proceeded as directed by Lucius Ordway in 1917.

The Government's principal citation to cases is for the proposition that a tax is not retroactive merely because "some" of the "facts and conditions upon which its application depends came into being prior to the enactment of the tax." Pet. Br. 19, quoting *United States v. Jacobs*, 306 U.S. 363, 367 (1939). While this is a correct statement of the law, the cases neither address retroactivity in the context of a disclaimer nor support a finding in this case that taxing Mrs. Irvine's disclaimer would be non-retroactive and therefore permissible. *Jacobs* was an estate tax case involving a tenancy by the entirety in which the *statute* expressly applied to tenancies created by transfers made prior to the statute's passage. *Id.* at 365. No question was presented under the Gift Tax Act, which, of course, expressly proscribes retroactive application to pre-Act transfers. Moreover, of critical significance is that Mrs. Irvine merely exercised a limited right not to

accept a gift, while the fundamentally different right of a survivor to own absolutely, to possess, and to dispose of property as he or she wishes upon the death of a co-tenant was at stake and found to be decisive in *Jacobs*. *Id.* at 367-68. The Court there concluded that the surviving co-tenant's ascension to complete ownership and possession made taxation "valid" as against constitutional attack.[12] *Id.* at 368. An analogous conclusion was reached in *Fernandez v. Wiener*, 326 U.S. 340, 348-350, 355-56 (1945) (estate tax case).[13] This characterization stands in stark contrast to Mrs. Irvine's limited right not to accept a gift.

Jacobs and other cases cited by the Government also are distingiushable on a ground of central relevance to the question of whether a statute acts retroactively. In those cases, the decedent—unlike Lucius Ordway—had an opportunity *after* passage of the taxing legislation to reorder his or her affairs to avoid the tax, and so no element of retroactivity was fairly presented. This feature indeed was the express ground for treating two groups of trusts differently in *Reinecke v. Northern Trust Co.*, 278 U.S. 339 (1929) (estate tax case). *See Jacobs*, 306 U.S. at 369; *Chase Nat'l Bank v. United States*, 278 U.S. 327, 334-345 (1929) (estate tax case).[14] It was not

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[12] The Government, of course, agrees that the statutory nonretroactivity of the Gift Tax Act is different from and stricter than any constitutional limitations. Pet. Br. 16-17 n.5. In the statutory context, moreover, ambiguities must be resolved in favor of prospective application. *Hassett v. Welch*, 303 U.S. 303, 314 (1938).

[13] In *Fernandez*, like other community property cases, the surviving co-tenant's interest was created through the operation of law, not a voluntary transfer. *See* 326 U.S. at 348. The absence of a protectible expectation on the part of the "donor" has been recognized as decisive in other retroactivity cases. *See, e.g., Welch v. Henry*, 305 U.S. 134, 147 (1938).

[14] *Cf. Gladney v. Commissioner*, 745 F.2d 955 (5th Cir. 1984), which upheld application of a 1969 tax on distributions by a private, tax-exempt foundation. Although the foundation was estab-

until death that the right to alter ended, and the relevant "transfer" was complete.

The reason why no precedent supports the rule advanced by the Government is that it serves no purpose articulated by Congress in 1932 or thereafter. A rule in which a beneficiary's right to disclaim is taxed based upon the law at the time of the disclaimer upsets the settlor's reasonable expectations, compromises his or her intent, promotes disparate treatment of similarly situated beneficiaries (thereby subverting Congress's purpose in passing 26 U.S.C. § 2518 to assure uniform treatment of beneficiaries), and by the addition of uncertainty frustrates attempts by taxpayers, in the Government's words, "to pursue their important gift and estate planning decisions with certainty." Pet. 21. On the other hand, all of these historically recognized interests in the taxation of gifts are advanced by the simple recognition that retroactivity in the disclaimer context is judged with reference to when the underlying interest was created.

The Government also throws up a straw man of sorts by claiming that respondents can prevail only at the expense of taxing or exempting from tax *every* interest based upon the date of its creation. "Many property rights currently in existence were created before 1932," the Government observes, suggesting that the transfer of none could be taxable if no tax is laid on the Irvine disclaimer. Pet. Br. 17. This simplistic assertion summarily ignores the distinction between gifts that have not been accepted and are subject to disclaimer and those that have been accepted and reduced to ownership and possession.[15] In the former case, as shown above, the donor

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lished as a testamentary trust in 1905, it did not seek tax-exempt status—and become potentially subject to the tax—until 1970. No retroactivity was present as the tax was based upon the trust's decision after passage of the taxing act to take advantage of the benefits of the Code.

[15] In the district court, the Ordways and the Government stipulated that *amicus* John Ordway never accepted "any interest what-

has a protected interest to see his or her irrevocable decisions to their completion. In the latter case, the donor's continuing legal interests have expired.[16]

At the *certiorari* stage, the Government complained that "the decision in this case offers significant new opportunities for gift and estate tax avoidance by members of the wealthiest class of taxpayers." Pet. 21. No "new" opportunities are at stake, however, as the Government itself does not appear regularly—if indeed *ever*—previously to have claimed a gift tax under the 1932 Act on the valid disclaimer of a pre-Act interest. *See* pp. 24-25, *infra; cf. Fuller v. Commissioner*, 37 T.C. 147 (1961) (disclaimer of pre-Act interest taxable where income from interest disclaimed had been accepted; retroactivity issue not addressed). More fundamentally, the idea that nonretroactive taxation operates as a device for evasion does disrespect to congressional intent. Dissenting in *Untermyer v. Anderson*, Justice Brandeis observed that nonretroactivity permits "evasion of the gift tax" by "the vigilant and ingenious." 276 U.S. at 450-51. Yet precisely that result is what Congress prescribed in § 501(b) of the Act, and has reintroduced into the law without exception in subsequent legislation affecting disclaimers and related rights.[17] To the extent Congress was free

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soever" in the portion of the trust he disclaimed. *Ordway v. United States*, No. 87-8187 (S.D. Fla.) (Pretrial Stipulation ¶ 5(f)).

[16] The distinction indeed is present in the 1958 Treasury Regulation which first imposed a separate federal standard for the taxation of disclaimers and which taxed any disclaimer not exercised "within a reasonable time." *See* 26 C.F.R. § 25.2511-1(c) (1958). As a leading contemporary commentator observed, this timeliness rule creates a "presumption of acceptance of the property," following which an otherwise valid disclaimer would be deemed to be a gift. *See* 5 Jacob Mertens, *The Law of Federal Gift and Estate Taxation* § 34.14 at 74 (1959).

[17] Congress elsewhere has elected to enact gift taxes prospectively, sacrificing many, many times the revenue at issue in this case. In

constitutionally to impose a retroactive tax it certainly can be said to have foregone potential revenue; what it preserved in the process, however, was its compact with the American people that, in the gift tax context, settled expectations would be honored and irrevocable actions would not be penalized after-the-fact.

II. DISCLAIMERS OF PRE-ACT INTERESTS ARE NOT WITHIN THE SCOPE OF TREAS. REG. § 25.2511-1(c)(2), AND ARE NOT OTHERWISE TAXABLE UNDER THE GIFT TAX ACT

The Government addresses at length whether the Irvine disclaimer is the disclaimer of an interest arising out of a "taxable transfer," and thus falls within the scope of the disclaimer regulation, 26 C.F.R. § 25.2511-1(c) (1986). To the extent the Gift Tax Act is construed not to apply retroactively to disclaimers of pre-Act interests, of course, the gift tax regulations are inapplicable and no question as to their meaning is presented for resolution. Indeed, it is noteworthy that the regulation itself parallels the non-retroactivity provision of the Gift Tax Act: by its own terms it provides that only disclaimers of post-Act "taxable" transfers may themselves be taxable, and as so interpreted follows the uniform and consistent treatment of adopting rules effective upon the creation of the interest. The Government argues nevertheless that even if the regulation is so limited, disclaimers of pre-Act interests are taxable because *all* disclaimers are taxable unless specifically exempted. Such a reading of the applicable statutes and regulations would be contrary to their plain language and history and would lead to anomalous results.

1986, for example, Congress enacted a generation-skipping transfer tax to replace one first imposed in 1976, but which proved unworkable. *See* Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431 *et seq.*, 100 Stat. 2085, 2717. The revision was made prospective; indeed, irrevocable gifts made in reliance upon the 1976 law were exempted permanently from any tax. *Id.*, § 1433(c), 100 Stat. 2731.

A. "Taxable Transfers" Include Only Those Transfers Occurring After June 6, 1932

The decision of the *en banc* majority of the court of appeals was based upon a reading of § 25.2511-1(c)(2), which addresses the taxability only of disclaimers of interests created in "taxable transfers." Because, as seems self-evident, a nontaxable pre-Act transfer into trust is not "taxable," the court concluded that the regulation was inapplicable and could not serve as a basis for imposing a tax on the Irvine disclaimer. In this regard the plain language of the regulation and associated statutory provisions leave no room for doubt. The term "taxable transfers" is a term of art defined by statute as follows:

> (26 U.S.C.) § 2501. Imposition of tax.
>
> (a) Taxable transfers.—
>
> (1) General rule.—A tax, computed as provided in section 2502, is hereby imposed for each calendar year on the transfer of property by gift *during such calendar year* by any individual, resident or nonresident.

(Emphasis added).[18] As the italicized language (omitted from the statute as reproduced at Pet. 60a) indicates, taxable transfers thus include only those transfers made during calendar years for which a tax may be computed, in accordance with Section 2502. As is apparent, Section 2502 is drafted specifically to exclude any period prior to June 7, 1932. *See* Addendum, *infra*, 1a. Applicable Treasury Regulations also are in accord. The first two sentences of § 25.2511-1(a) (promulgated in 1958), unambiguously equate a "taxable transfer" with a transfer to which the gift tax applies. *See* Addendum, *infra*, 2a.

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[18] Section 2501(a) was added to the Code in 1954. Act of August 16, 1954, c. 736, 68 Stat. 403. The title "[t]axable transfers" was added in 1966 following amendments not relevant here. Foreign Investors Tax Act of 1966, Pub. L. 89-809, § 109(a), 80 Stat. 1575.

The Government thus also is incorrect when it suggests that "taxable transfer" was only added to the regulation in 1986. Pet. Br. 24-25 n.12.

The Government's arguments to the contrary are based upon a selective inattention to relevant regulatory language. Thus, the Government seeks to equate "taxable transfer" with a "completed gift," which concededly occurred in 1917 when Lucius Ordway made an irrevocable transfer into trust. Pet. Br. 24-26. *First,* the regulation relied upon by the Government by its own terms does not apply to disclaimers of interests created prior to January 1, 1977. *See* Treas. Reg. § 25.2518-1(a). *Second,* the regulation equates "taxable transfer" with a "completed gift *for Federal gift tax purposes.*" *Id.* This limitation anchors "taxable transfer" firmly in the language of 26 U.S.C. § 2501 and the 1932 Act, and in rules that define a "completed gift for Federal gift tax purposes" to include only those subject to the gift tax. *See also* Treas. Reg. § 25.2511-2(a) and (b). Since, as all parties agree, the 1917 transfer is not subject to the gift tax, it cannot be a "completed gift for Federal gift tax purposes." Any other conclusion would permit the Gift Tax Act's requirement of nonretroactivity to be overruled by an administrative regulation. *Cf. National Muffler Dealers Ass'n v. United States,* 440 U.S. 472, 477 (1979); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 213-14 (1976).

The Government seeks to support its interpretation of the Treasury Regulations by staking a claim to deference because its interpretation of "taxable transfer" has been consistently maintained. Pet. Br. 27. No deference is due an agency's construction of a regulation that is contrary to the regulation's plain meaning, however. *See Gardebring v. Commissioner,* 485 U.S. 415, 430 (1988). Moreover, no authority is cited for this assertion of consistency. The contrary definition appearing in 26 U.S.C. § 2501(a) (added in 1966) and Treas. Reg.

§ 25.2511-1(a) (1958) would in any event belie the claim.

B. Treas. Reg. § 25.2511-1(c)(2) Is Not A "Safe Harbor" From A Rule Of Universal Taxation Of All Disclaimers

The Government contends that, even if it is wrong in construing § 25.2511-1(c)(2) to apply to the disclaimer of a pre-Act 1917 interest, the disclaimer must nevertheless be taxable under the general principle that any gift not specifically exempted from the taxing statute is within it. Pet. Br. 23-27. Thus, the Government argues, § 25.2511-1(c)(2) is merely a "safe harbor" in a sea of taxation, without whose protection the expansive language of the taxing authority would apply automatically. To conclude this is so, however, would require adoption of an irrational and baseless interpertation of the regulation that is at odds with all available historical evidence.[19]

Under the Government's alternative reading, the regulatory "safe harbor" would only *commence* for interests created after June 6, 1932. Thus, for interests in trust created on June 5, 1932, *every* disclaimer would be taxable, even if valid under state law and made within a "reasonable time." A disclaimer made on the same day but stemming from an interest in trust created on June 7, 1932, however, would not be deemed a gift. This result,

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[19] The Government's assertion that it may, by regulation, create a substantive exemption from what it repeatedly characterizes as an unambiguous and unqualified statutory mandate to tax is itself a novel concept. If, as the Government asserts, there is no question but that every disclaimer is within the scope of the gift tax, Pet. Br. 14-16, 27-28, it is not for the agency to say differently. *See, e.g., National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979). The statute, of course, has not been read so broadly, as discussed *infra*. The Court in *Jewett v. United States* did consider the taxability of disclaimers, but only to conclude that Treas. Reg. § 25.2511-1(c) was consistent with its statutory authority. *See* 455 U.S. at 309-310.

required according to the Government by a regulation not promulgated until 1958, retroactively penalizes the settlor who established a trust *earlier*, prior to passage of the Gift Tax Act. It also requires the startling and historically repudiated conclusion that the acceptance of a gift is not required for the federal gift tax to be applied, and that a person thus may be forced to accept an unsolicited gift or be taxed upon refusing to do so. *See Jewett*, 455 U.S. at 323 (Blackmun, J., dissenting). The Government's "safe harbor" theory is arbitrary and capricious and indeed implicates a principal factor employed in contemporary analysis of the constitutionality of retroactive taxation. *See United States v. Hemme*, 476 U.S. at 569 (considering "whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute").

An interpretation that avoids such anomalies and comports with historical evidence is that § 25.2511-1(c) is an effort by the Commissioner, commenced in 1958, to carve out a limited exemption from the prevailing understanding that disclaimers valid under state law were not considered "transfers," and thus were not subject to gift tax at all. Notwithstanding the admitted breadth of the gift tax, prior to 1958 no separate federal standard existed for the taxation of disclaimers. After passage of the 1932 Act, case law, to the extent it existed, was all to the effect that disclaimers that were valid under state law involved gifts that were never accepted, and thus not "transferred" upon exercise of a disclaimer; accordingly, there was no federal standard of deemed acceptance superimposed on state law, and valid disclaimers thus were not subject to gift tax. This Court in *Jewett* so concluded, discussing at length the early cases of *Brown v. Routzahn*, 63 F.2d 914 (6th Cir.), *cert. denied*, 290 U.S. 641 (1933), and *Hardenbergh v. Commissioner*, 198 F.2d 63 (8th Cir.), *cert. denied*, 344 U.S. 836 (1952), and observing that "under those cases state law controlled both the 'right' to renounce and the 'timeliness' of the renunciation" for

federal gift tax purposes. 455 U.S. at 315. *Jewett* acknowledged, in other words, that a disclaimer valid under state law was not subject to gift tax prior to the 1958 regulation. This understanding remained the law through the 1950s,[20] and explains why the issue of retroactive taxation of disclaimers of pre-Act interests was not decided in the years following 1932: *no* valid disclaimers were thought to be taxable.

Against this background, the 1958 regulation's addition of a federal "reasonable time" standard quite clearly was not an effort to exempt disclaimers from taxation. On the contrary, it provided the rationale for *taxing* a disclaimer valid under state law but held long enough to be deemed for tax purposes to have been accepted under a newly adopted federal standard. *See Jewett*, 455 U.S. at 316-17 & n.17; pp. 18-19, *supra*. The 1976 legislation promoted uniformity in the taxation of disclaimers by codifying a "reasonable time" to be nine months, and the 1986 version of Treas. Reg. § 25.2511-1(c)(2) implemented the statutory change for disclaimers of interests created after December 31, 1976. With respect to disclaimers of interests created prior to that date, the "reasonable time" standard remained the same, and there is no evidence that the 1986 revision altered in any way the Service's conception of the regulation as attempting solely to add the

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[20] *Brown v. Routzahn*, holding that a valid disclaimer under state law is not a transfer for federal gift tax purposes, was assumed by "taxpayers and presumably the Bureau of Internal Revenue" as settling the law. *See* Christian Marius Lauritzen, II, *Only God Can Make An Heir*, 48 Northwestern U. L. Rev. 568, 577-78 n.57 (1953), quoting American Bar Ass'n, *Report of Committee on Federal Estate and Gift Taxes*, Recommendation III, p. 19 (1953); Edward T. and Sheila M. Roehner, *Renunciation As Taxable Gift—An Unconstitutional Federal Tax Decision*, 8 Tax L. Rev. 289, 314 (1953). There is no statute of limitations on the failure to file a gift tax return reporting a taxable disclaimer. *See* 26 U.S.C. § 6501(c)(3). One can only speculate how many thousands of unreported disclaimers would become subject to tax, penalties, and interest if the Government's alternative position in this case were upheld.

concept of deemed acceptance through creation of a federal standard.

So understood, the Government's *post-hoc* characterization of the regulation as a "safe harbor" seems hopelessly divorced from any basis in law, fact, or history. It is contrary to the Secretary's clear intent in promulgating the regulation, and is entitled to no deference. *See Gardebring v. Commissioner,* 485 U.S. at 430. The regulation's purpose, by imposing a standard of deemed acceptance of a gift still subject to valid disclaimer, is to prescribe exceptions to the general understanding that such a disclaimer will not be subject to tax. To the extent the regulation—as limited to post-Act "taxable" transfers—is interpreted not to cover every disclaimer theoretically within the scope of the Act, what is omitted remains within the general rule of nontaxability. To construe the Service's own regulation, or the statute, as requiring a contrary result is to rewrite the entire history of the regulation and the Service's interpretation of the Gift Tax Act. It imputes to Congress and the Service a view that all valid disclaimers are taxable—one that is precisely the *opposite* of what was believed when both the statute and the regulation were first written. Thus *Dickman v. Commissioner,* 465 U.S. 330 (1984), which found the Gift Tax Act broadly applicable to transactions found to be transfers, is inapposite because the Service has never so characterized every valid disclaimer. So too is the rule that outright exemptions from the taxing statute are to be narrowly construed, as the regulation is not an exemption.[21]

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[21] The Government's reliance upon principles of narrow construction for exemptions from taxation would in any event be difficult to accept here, even assuming that canon applicable to Treasury Regulations. Section 25.2511-1(c) on its face deals only with *testamentary* transfers, as Judge Loken observed, concurring with *en banc* majority in the court of appeals. Pet. App. 12a-16a. Nevertheless, the principles of the regulation have been extended by the Government to *inter vivos* transfers, merely supporting the argument in the text that the omission from § 25.2511-1(c)(2) of a

C. Treas. Reg. § 25.2511-1(c)(2) Could Not Apply Differently To The Irvine And Ordway Disclaimers

The overriding need for a uniform rule of taxation is made all the more evident by respondents' suggestion at the *certiorari* stage that Mrs. Irvine's disclaimer could not constitutionally be taxed under the 1986 disclaimer regulation, as the Government seeks to construe it. Observing that Mrs. Irvine learned of her right and reached majority prior to 1932, respondents argued in the alternative that the regulatory requirement that she have disclaimed within a "reasonable time" of her knowledge of a right to disclaim could not have been satisfied because it would have expired even before passage of the 1932 Act. No such certainty is possible, however, as "reasonable time" determinations are questions of fact under the regulation. *See Patterson v. Commissioner*, 46 T.C.M. (CCH) 618 (1983). Moreover, respondents' argument is fundamentally flawed because the 1986 regulation, by the Government's reckoning, could not have applied to disclaimers made prior to January 1, 1955. The original 1958 disclaimer regulation construed the 1954 Internal Revenue Code, and by its own terms purports to be retroactive only to January 1, 1955—the effective date of the 1954 act. *See* 23 Fed. Reg. 8904 (1958). The 1986 regulation, which amended the 1958 regulation and was based on 1976 legislation, similarly was not made retroactive to 1932. *See* 51 Fed. Reg. 28366 (1986). Clearly, the 1986 regulation could not require that a disclaimer be made prior to 1932, as respondents speculate that the Government would require.[22] Accordingly, the dates when

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reference to a specific class of disclaimers does not mean they are taxable. *See* 5 Boris I. Bittker and Lawrence Lokken, *Federal Taxation of Income, Estates and Gifts*, ¶ 121.7.1 at 121-47 (2d ed. 1993).

[22] The Government does allege that all disclaimers are taxable, and have been so since 1932. In that event John Ordway, who learned of his interest and reached majority in 1943, would have been denied any chance to disclaim without tax consequences.

Mrs. Irvine learned of her interest and reached the age of majority have no bearing on this case, and do not distinguish her disclaimer from other Ordway Trust disclaimants.[23] Moreover, this speculation as to dates underscores the need for a uniform standard, under which similarly situated taxpayers are treated the same based upon the rules in effect when their interests were created.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[23] Statements to the contrary apparently made in error by Government Counsel below cannot, of course, alter the effective date of the regulations. *See* Pet. Opp. 8 n.9.

ADDENDUM

INTERNAL REVENUE CODE
(26 U.S.C.)

§ 2502. Rate of tax

(a) Computation of tax.—The tax imposed by section 2501 for each calendar year shall be an amount equal to the excess of—

(1) a tentative tax, computed under section 2001(c) on the aggregate sum of the taxable gifts for such calendar year and for each of the preceding calendar periods, over

(2) a tentative tax, computed under such section, on the aggregate sum of the taxable gifts for each of the preceding calendar periods.

(b) Preceding calendar period.—Whenever used in this title in connection with the gift tax imposed by this chapter, the term "preceding calendar period" means—

(1) calendar years 1932 and 1970 and all calendar years intervening between calendar year 1932 and calendar year 1970,

(2) the first calendar quarter of calendar year 1971 and all calendar quarters intervening between such calendar quarter and the first calendar quarter of calendar year 1982, and

(3) all calendar years after 1981 and before the calendar year for which the tax is being computed.

For purposes of paragraph (1), the term "calendar year 1932" includes only that portion of such year after June 6, 1932.

(c) Tax to be paid by donor.—The tax imposed by section 2501 shall be paid by the donor.

TREASURY REGULATIONS
26 C.F.R. § 25.2511-1(a) (1958)

§ 25.2511-1 *Transfers in general.* (a) The gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. For example, a taxable transfer may be effected by the creation of a trust, the forgiving of a debt, the assignment of a judgment, the assignment of the benefits of an insurance policy, or the transfer of cash, certificates of deposit, or Federal, State or municipal bonds. . . .